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FALSE AND VEXATIOUS LITIGATION IN ANCIENT HINDU LAW

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The idea of punishing and discouraging false and vexatious claims or defences by awarding compensatory costs to the successful party is not a new or modern one. Even in our ancient legal system we find such a practice in a more well defined and detailed fashion.

A false or vexatious claim पक्षाभास has been described thus.

"अप्रसिद्धं, निराबाधं, निरर्थं, निष्प्रयोजनम् ।
असाध्यं वा विरुद्धं वा, पक्षाभासं विवर्जयेत् ॥"

(1) अप्रसिद्धं = Unnatural, unusual or unknown, *e.g.*, Defendant has taken away the horns of the plaintiff's hare.

(2) निराबाधं = Harmless, trivial, *e.g.*, defendant is doing his business in his house with the aid of the light in plaintiff's house.

(3) निरर्थं = Meaningless, unintelligible.

(4) निष्प्रयोजनं = Useless, *e.g.*, the defendant has been singing near plaintiff's house.

(5) असाध्यं = Improbable, impracticable, *e.g.*, the defendant has derided or ridiculed the plaintiff with a frown (भ्रूभंगेन)

(6) विरुद्धं = Unnatural, *e.g.*, the plaintiff has been scolded by the defendant (who is dumb).

Kinds of Defences to an action

Katyayana has enumerated four kinds of defences:—

"सत्यं मिथ्योत्तरं चैव, प्रत्यवस्कन्दनं तथा ।
पूर्वन्यायविधिश्चैवमुत्तरं स्याच्चतुर्विधम् ॥"

or

(1) संप्रतिपत्तिः (2) मिथ्या or निह्नव or अपह्नव (3) प्रत्यवस्कन्दनं (4) प्राङ्न्यायः.

(1) Cognovit or defendant admitting the claim. (2) Denial of claim. (3) Plea of discharge. (4) Plea of *res judicata.*

It is unnecessary to discuss the cases where the defendant admits the suit claim. The rest alone need to be dealt with.

(2) निह्नव Where the defendant denies the debt or the suit claim. If the plaintiff sucessfully proves his case, the defendant besides paying the suit amount will have to pay an equal amount to the King as a sort of fine for setting up a false defence (मिथ्योत्तर or निह्नव)

"निह्नवे भावितो दद्यात्, धनं राज्ञे च तत्समम् ।
मिथ्याभियोगी द्विगुणं, अभियोगाद्धनं हरेत् ॥"

If the plaintiff fails to prove his case where the defendant denies the debt or claim, then the plaintiff will be mulcted with a payment of twice the suit amount to the king, as the plaintiff is guilty of advancing a false claim (पक्षाभास)

(3) & (4) प्रत्यवस्कन्दनं, and प्राङ्न्याय Plea of discharge and plea of *res judicata.* The same rule applies to these two cases also. But when the defendant fails to establish that the suit is barred by *res judicata* or fails to prove that he had already discharged the debt, he has to pay the suit amount to the plaintiff and twice of it to the King.

"अथ प्रत्यर्थी प्राङ्न्यायं, कारणं वा भावयितुं न शक्नोति तदा स एव मिथ्याभियोगीति राज्ञे द्विगुणं धनं दद्यात् ॥"

Vignaneswara.

Even when the plaintiff is not able to state his case properly he will be considered to be a false claimant and he has to pay twice the suit amount to the king as fine.

"अथ अभियोक्ता अभियोगं वक्तुं न शक्नोति तदा मिथ्याभियोगीति प्रतिपदोक्तं धनं दण्डं द्विगुणं दद्यादिति विधीयते ।"

Vignaneswara.

INCONSISTENT PLEAS or हीनवादः: Parties are not allowed to take up inconsistent positions or raise inconsistent pleas during the course

of the trial; and if they do so they will be fined. Thus we see that the principle in the maxims *'Ordine placitandi servato servatur et jus'* *i.e.*, the order of the pleading being preserved the law is preserved; and *'Nemo potest mutare consilium suum in alterius injurium,'* *i.e.* no one can change his mind to the prejudice of another's right' was observed even in those days also. Narada describes हीनवाद thus.

"पूर्वपादं परित्यज्य योऽन्यमालम्बते पुनः ।
पदसंक्रमणाज्ज्ञेयो हीनवादी स वै नरः ॥"

For example, if the plaintiff at the time of the complaint stage (आवेदनसमये) states, that the defendant borrowed the suit amount from him, and subsequently changes his case at the time of giving evidence (भाषासमये) that defendant has stolen the amount, the plaintiff is liable to be punished as हीनवादिन्; but only with a fine and not with an amount equal to the suit claim.

हीनवादी दण्ड्यो भवति न प्रकृतार्थाद्धीयते ।

हीनवाद is also described by another sage thus:

"अन्यवादी, क्रियाद्वेषी, नोपस्थाता निरुत्तरः ।
आहूत प्रपलायी च हीनः पञ्चविधः स्मृतः ॥"

(1) One who changes his case during trial or a prevaricating witness. (2) A hostile witness. (3) A party who does not stand in front of the Judge. (4) One who refuses to give evidence. (5) One who absconds when summoned.

Vague and indefinite replies or defences etc.

Vague and indefinite replies or defences were discouraged and punished. *Cf.* *'causa vaga et incerta non est causa rationabilis'* *i.e.*, a vague and uncertain cause is not a reasonable cause. The following are some of the typical instances of such vague and indefinite defences.

(1) संदिग्ध *e.g.*, Patent ambiguity—when the suit is laid for the recovery of 100 gold coins सुवर्णाः, defendant's answer is, he migh have borrowed 100 सुवर्णाः or 100 माषाः—.

(2) प्रकृतादन्यत् *e.g.*, when the suit is for 100 सुवर्णाः, defendant says that he once borrowed 100 पणाः.

(3) अत्यल्पं (4) अतिभूरि

(5) व्यस्तपदं Irrelevant reply *e.g.*, when the plaintiff claims 100 सुवर्णाः the defendant pleads that he was beaten by the plaintiff.

(6) निगूढार्थं—When the plaintiff claims 100 सुवर्णाः defendant replies that he does not owe anything to this plaintiff.

(7) आकुलं Absurd defence—To say that he has borrowed the amount from the plaintiff but he does not owe him anything (without pleading discharge).

(8) व्याख्यागम्यं Ambiguous or unintelligible replies.

(9) असारं Meaningless and silly replies *e.g.*, when the suit is for principal and interest, defendant pleads that he has already paid the interest but the principal amount was not borrowed by him.

(10) संकरोत्तर Confusion of pleas or replies *e.g.*, admitting the suit claim in one place, denying it in another and pleading discharge in a third—

Punishment for giving false evidence

Witnesses were also punished for giving false evidence. Yagnavalkya says.

"पृथक् पृथक् दण्डनीयाः कूटकृत्साक्षिणस्तथा ।
विवादाद्द्विगुणं दण्डं विवास्यो ब्राह्मणः स्मृतः ॥"

Each one of the false witnesses should be fined with double the suit amount: and in the case of a Brahmin he should be exiled.

"यः साक्ष्यं श्रावितोऽन्येभ्यो निह्नुते तत्तमोवृतः ।
स दाप्योऽष्टगुणं दण्डं, ब्राह्मणं तु विवासयेत् ॥" *Ibid.*

When a witness, having agreed to give evidence and having received instructions also along with the other witnesses, denies everything at the time of giving evidence, he is liable to be fined with eight times the suit amount; and if he is a Brahmin he should be banished.

Punishment for Kings and Judges:

Not only false and vexatious litigants and witnesses were punished but also Kings and Judges, who did not properly administer justice out of fear, favour or malice. Manu says:

"अदण्ड्यान् दण्डयन् राजा, दण्ड्यांश्चैवाप्यदण्डयन् ।
अयशो महदाप्नोति नरकं चैव गच्छति ॥"

Punishing the innocent and acquitting the guilty, the King suffers from infamy and goes to hell. He should administer justice without malice.

"धर्मशास्त्रानुसारेण क्रोधलोभविवर्जितः ।
रागाल्लोभाद्भयाद्वापि स्मृत्यपेतादिकारिणः ।

सभ्याः पृथक् पृथक् दण्ड्याः, विवादात् द्विगुणं दमम् ॥"

Out of affection (sympathy or love) or out of covetousness (avarice) or out of fear if Judges decide cases in derogation of law, they are each liable to be fined with twice the suit amount—

There used to be four grades of courts.

(1) नृपाधिकृताः (2) पूगः (3) श्रेणी (4) कुल.

नृपाधिकृत acted as the highest appellate tribunal, but further appeals lay to it from its own decisions with a change of advisors or Judges. If the appeal failed the defeated appellant was punished and if it succeeded the erstwhile Judges who wrongly decided the appeal previously were punished.

SUMMARY OF ENGLISH CASES.

MYERS *v.* EDMAN, (1940) A.C. 282 (H.L.).

Solicitor—Negligence in leaving conduct of case to managing clerk who caused to be filed false and inadequate affidavit of documents—Jurisdiction of Court to order solicitor to pay costs personally.

A solicitor through his managing clerk (to whom he left the conduct of a case) " as a result of a deliberate policy adopted in his office, in the conduct of the defence and in relation to discovery increased the plaintiff's difficulties, added to the expense and obstructed the interests of justice" by filing wholly inadequate and false affidavits and documents,

Held [reversing the majority view of the Court of Appeal in (1938) 3 All.E.R. 498], the Court has jurisdiction to order the solicitor to pay costs. The primary object of the Court is not to punish the solicitor, but to protect the client who has suffered and to indemnify the party who has been injured. The solicitor cannot escape his liability by dissociating himself from the acts and defaults of his managing clerk whose acts are to be treated as the acts of the principal. It is immaterial that no professional misconduct is attributed to the solicitor personally.

SCOTT *v.* FRANK F. SCOTT (LONDON), LTD., (1940) 1 Ch. 217.

Companies—Articles of association not in accordance with intention of signatories—Rectification—If can be made by Court.

The Court has no jurisdiction to rectify articles of association, even although it should be proved that the articles of association do not accord with what is proved to have been the concurrent intention of the signatories at the moment of their signature.

BISMAG, LTD. *v.* AMBLINS (CHEMISTS), LTD., (1940) 1 Ch. 225.

Trade Marks Act (1938) (*c.* 22), *S.* 4—*Use by defendant of plaintiff's trade mark in relation to plaintiffs' own goods—If infringement.*

Plaintiffs had registered "bisurated" as trade mark in respect of (1) their patent medicine and (2) chemical substance for use in pharmacy. Defendants carrying on business of manufacture and sale of medicinal preparations issued pamphlets showing the exorbitant cost of patent medicines and their analysis and offering the same prescription at much less cost.

Held, this did not constitute an infringement as the defendants do not by any means seek to describe goods of their own manufacture by the plaintiffs' mark. On the contrary they emphasise the distinction between their own and the plaintiffs' goods.

[See on Appeal in (1940) 2. All. E.R. 608.]

In re ZAKON : *Ex parte* THE TRUSTEE *v.* BUSHELL, (1940) 1 Ch. 253.

Bankruptcy—Trustee under abortive deed of assignment for benefit of creditors—If entitled to retain from profits of business expenses incurred against trustee in subsequent bankruptcy.

On November 12, 1938, the bankrupt executed an assignment of his properties to the respondent as trustee for the benefit of his creditors. On November, 17, 1938, the respondent procured the deed to be registered and incurred expenses. On November 18, 1938, a meeting of creditors was held and the majority of creditors were not in favour of the deed. On November 24, 1938, a creditor presented a bankruptcy petition and a receiving order was made on January 5, 1939 and on February 1 the bankrupt was adjudicated. On January 25 the applicant was appointed trustee of the debtor's property. When the respondent was called upon by the trustee in bankruptcy to hand over the collections he had made, the respondent sought to retain from the profits of the business, the amount which he was out of pocket in carrying on the business.

Held, the respondent expended the money entirely at his risk and the trustee in bankruptcy was entitled to the whole amount.

In re HODGE : HODGE *v.* GRIFFITHS, (1940) 1 Ch. 260.

Will—Gift burdened with a condition—Devisee paying for some time the surplus amounts directed to be paid under the will—Personal liability—If imposed—Gift if can be disclaimed after acts indicating acceptance.

A wife appointed her husband and mother executors and trustees of her will and devised a freehold thus : "I give and bequeath the freehold to my husband *A.H.* in consideration of his paying to my sister *C.M.G.* the sum of 2*l.* per week during her life and I further direct that in the event of my said husband disposing of the whole property the annuity of 2*l.* per week shall cease and in lieu thereof

he shall invest the sum of 2,000*l.* in authorised trustees securities in the name of *C.M.G.*, *A.H.* and the other executor........and as to the remainder of my estate I give to *A.H.* my husband absolutely."

The surplus income was insufficient to provide the 2*l.* a week to *C.M.G.* and *A.H.* paid for 4 years the 2*l.* making up the deficiency from his own pocket. *A.H.* took out a summons to determine whether any personal liability was imposed on him to pay *C.M.G.* irrespective of the testatrix's interest in the property.

Held, in the circumstances *A.H.* had accepted the gift by his conduct and the obligation to make the weekly payments or provide 2,000*l.* has become binding upon him and it is not open to him to disclaim the gift.

ENGLISH AND SCOTTISH CO-OPERATIVE SOCIETY, LTD. *v.* ODHAMS PRESS, LTD., (1940) 1 K.B. 440 (C.A.).

Tort—Libel and slander—Headline in newspaper literally true—When capable of an innuendo*—Manner and occasion of the publication—Effect.*

Plaintiff, a co-operative society, though there was no question whatever as to any moral guilt at all or any fraud, was charged as a test case with making a " false return " in that a particular entry was wrong. Plaintiff's auditors and legal advisers had given the opinion that a certain accession to the wealth of the society can be treated as ' capital ' and the public auditor contended that it should be treated as profits. The plaintiffs were fined on the charge. The defendants, a newspaper, published a report with a prominent headline in bold types " *False Profit Return—Charge Against Society*," followed by an account of the proceedings which were in their natural meaning an accurate statement of facts with some portions printed more prominently than others. The plaintiffs pleaded an *innuendo* that the words were meant and understood to mean that the plaintiffs had deliberately falsified their accounts and that they had published a return of annual profits which they knew to be wrong and that they had done so with a view to deceiving their constituents and the general public as to their true position and that they were insolvent or unstable and a society which investors should avoid and that they carried on their business by dishonest methods. Defendants objected to the *innuendo* on the ground that the words in their natural and ordinary meaning were incapable of the *innuendo*.

Held, having regard to the ambiguous if not the primary meaning of the word " false "—namely that it connotes something of a fraudulent nature and the mode and occasion of the publication the words are capable of the *innuendo* and the plaintiffs are entitled to more than nominal damages. A new Trial on the issue of Damages was ordered.

BRITON FERRY STEEL CO., LTD. *v.* BARRY, (1940) 1 K.B. 463 (C.A.).

Income-tax—Finance Act, 1926, S. 32 (2)—Merger of manufacturing parent and subsidiary companies—Liability of parent company to tax as successor to business of subsidiary company.

On the liquidation of six wholly owned subsidiary companies the business was transferred to the parent company and the parent company instead of manufacturing and supplying steel bars to the subsidiary companies to be made into tin plates began to make the tin plates themselves.

Held, on the facts the parent company had succeeded to the business of the six subsidiary companies and were liable to tax as such.

ROUSE *v.* GRAVELWORKS, LTD., (1940) 1 K.B. 489 (C.A.).

Easements—Natural right to support of land—Water collecting in quarrying pits blown over neighbour's land by wind—Liability.

The defendants by digging gravel on their property allowed water to collect in the extensive pit and the water was blown over the neighbouring (plaintiff's) land washing away the boundary and causing damage by erosion.

Held, the defendant had used the land naturally and is not liable for the destruction of the natural lateral support of the plaintiff's land by operation of natural forces. The plaintiff had no cause of action.

ALDHAM *v.* UNITED DAIRIES, (1940) 1 K.B. 507 (C.A.).

Tort—Negligence—Pony attached to carriage left unattended—Injury to plaintiff attacked by such animal—Owner's liability for damages.

The jury found that the defendant was negligent in leaving a pony attached to a carriage unattended and plaintiff was injured by the pony.

Held, a driver who knowingly leaves a restive pony unattended is justly held guilty of negligence. The facts in the case fully justified the inference that the plaintiff's injuries were directly caused by the negligence of the defendant's servant in leaving an impatient horse unattended for too long a time.

Cox v. *Burbidge*, (1863) 13 C.B.N.S. 430 distinguished and (1939) 3 All.E.R. 478 reversed.

WAY *v.* PENRIKYBER NAVIGATION COLLIERY CO., LTD., (1940) 1 K.B. 517 (C.A.).

Workman's Compensation—Accident arising in the course of Employment—Payment of compensation after notice of accident—How far evidence of accident.

Slesser, MacKinnon and Goddard, L. JJ. (*Slesser, L.J., dissenting*).—In the absence of any evidence from employers, the fact of their paying compensation under the Act, is some evidence that they admitted that there was an accident.

Per *Slesser, L.J.*—It can amount to no more than an admission that on that date having received notice of accident, the employers paid to the workman a certain sum of moneys possibly equivalent to the sum which he would have been entitled to receive if he had a right to compensation.

CHAPELTON *v.* BARRY URBAN DISTRICT COUNCIL, (1940) 1 K.B. 532 (C.A.).

Contract—Hire of deck chairs—Ticket or receipt for the hire with conditions on it—If contract subject to the conditions.

A person who hired a deck chair on the beach suffered injury by the chair giving way. He sued the defendants for damages for negligence in providing a chair which was unfit for use. The defendants relied on conditions excluding liability printed on the tickets.

Held, the cases dealing with railway tickets, cloak room tickets, or documents issued by bailees when they take charge of goods have no analogy to this case. The plaintiff paid 2*d.* in order to have the right to sit on a chair on the beach. He was asked to take a receipt in the form of a ticket. The plaintiff cannot be deemed to have entered into a contract in the terms of the words printed on the back of the receipt. Defendants were liable for damages.

LIFFEN *v.* WATSON, (1940) 1 K.B. 556 (C.A.).

Tort—Damages—Personal injury disabling plaintiff—Loss of boarding and lodging from employer during disablement—If to be included in damages—Provision of board and lodging by father—Effect.

Plaintiff who was injured while a passenger in a taxicab owing to the negligent driving by the defendant was unable to continue in her employment as a domestic servant. She claimed damages for (1) loss of wages and (2) loss of board and lodging. The trial Judge awarded damages for loss of wages but refused damages for loss of board and lodging on the ground that plaintiff's father provided the boarding and lodging and there was no evidence of any promise by the plaintiff to pay her father. On appeal,

Held, it does not matter whether after the accident the plaintiff was taken in by her father. The only consideration is what the plaintiff lost. She lost the value of the board and lodging just as she lost her wages and she is entitled to be compensated for that loss.

SOTHERDEN *v.* SOTHERDEN, (1940) P. 73 (C.A.).

Divorce—Desertion—Deserted spouse in mental hospital at commencement of desertion and during part of the three years prior to petition—Effect on the period of desertion.

In August, 1931, the wife who suffered from mental infirmity had to go to a hospital whence she was transferred in February, 1932, to a mental hospital where she remained till September, 1936 when she was able to leave the hospital. About July 25, 1932, the husband went off and never saw his wife or offered her a matrimonial home. The wife filed a petition on November 23, 1938, for divorce, on the ground of desertion for three years.

Held, the fact that the wife was in the mental hospital during part of the three years period does not prevent her from alleging that her husband deserted her for the statutory period.

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MACKENZIE *v.* MACKENZIE, (1940) P. 81.

Divorce—Desertion—Clause inserted by inadvertence by the clerk in maintenance order by Magistrate against husband that wife not bound to cohabit with husband—Effect on desertion.

In the usual printed form of maintenance order by a Magistrate in favour of the wife by inadvertence, the clause "that the complainant be no longer bound to cohabit with her husband the defendant" was not scored out and the order served on the husband. Subsequently in the wife's petition for divorce alleging desertion,

Held, the order so existing at all material times, the petitioner (the wife) cannot satisfy the requirements of the statute as to the period of desertion when the order subsisted.

CAMPBELL *v.* CAMPBELL, LEWIS AND KEITH, (1940) P. 90.

Divorce—Practice—Discovery—Respondent in her cross-petition alleging husband's association with named woman as conducing to her adultery—Respondent disclosing some documents and asking for further affidavit of documents from the husband—If discovery to be ordered.

In a husband's petition for a dissolution of marriage on the ground of adultery the wife in her cross-petition alleged that the husband had conduced to her adultery by neglecting her and by association with a married woman. She disclosed in her affidavit of documents several documents bearing on the alleged association and applied for a further and better affidavit from her husband.

Held, the wife's allegation is not on the face of it an allegation of adultery, nor is it necessary that it should be so. As the matter is relevant on the question of conduct conducing to adultery the order for discovery should be made.

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JOTTINGS AND CUTTINGS.

CHAIRMAN YENGEYO MUNICIPALITY *v.* AKASA RAMA IYER*

A sketch by the Hon'ble Mr. Justice Wadsworth, broadcast from the Madras Station of All India Radio.

Peon : Silence !

(*A confused babble of conversation and a scraping of chairs.*)

Clerk : S.C. No. 999 of 1938.—Chairman, Yengeyo Municipality *versus* Akasa Ramayyar.

LP2341

Plff's. Counsel : May it please your honour. This suit, is preferred to recover a sum of Rs. 19-15-11, due from the defendant by way of profession tax to the municipality. The defendant admits that the amount was demanded, that it is the correct amount according to the prescribed scale and that it has not been paid. I submit that it is for the defendant to establish the rather unusual defence which he has seen fit to plead.

Judge : Yes, Mr. Charjam Ayyar. I agree that the burden is on the defendant. Will you begin, please, Mr. Mekha Row ?

Def. C. : As your honour pleases. I do not think that any lengthy opening is necessary. As my friend has said, we admit the non-payment of the tax demanded. But what we do not admit is the right of the plaintiff to demand that tax. Putting it briefly, my case is that the Yengeyo municipality is not entitled to collect taxes because it has ceased to function as a municipality. The defendant alleges that the municipal council has degenerated into a mere battlefield for the local factions and has become a centre of corruption and intrigue. We are prepared to prove that, far from being the guardian of the welfare of the citizens of the town, the municipality has been engaged in activities which are prejudicial to the well-being of the townsfolk in general and of the defendant as one of them. It is not therefore either in law or equity entitled to require the defendant to contribute to his own detriment. I will now call the defendant. Mr. Akasa Ramayyar !

Crier : Akasa Ramayyar ! Akasa Ramayyar !

(*Oath.*)

Def. C. : You are the defendant in this suit and you admit that the technically correct amount of profession tax was demanded from you and that you refused to pay it.

Akasa Ramayyar : Yes and what is more I am not going to....

* Published with the permission of All India Radio.

Def. C.:—Please, Mr. Ramayyar, confine yourself to answering the questions. You say in effect that there is no longer any lawful municipality entitled to levy taxes. Will you tell the Court why you have come to this conclusion?

A. R.: Well, I take it that the function of a municipality is to provide for the health, amenities and education of the townsfolk. This municipality does nothing but encourage dirt, disease and disputes.

(*Uproar. Shouts of "Silence." Uproar gradually subsides.*)

Judge: Unless silence is observed, I shall have to clear the Court. Go on, Mr. Mekha Row.

Def. C.: What do you mean by saying that the municipality encourages dirt? Please illustrate your accusation.

A. R.: They let the drains get blocked up till they are nothing but stinking cess-pools, they don't clean or repair the streets, they don't collect any taxes from the councillors or their relatives and those taxes they do collect are embezzled or frittered away. What I mean is that by their corruption and indifference, the staff is encouraged to neglect the sanitation of the town and so to cause filth and disease.

Def. C.: So much for dirt and disease; but what about disputes? How can you say that the municipality encourages factions?

A. R.: I mean that the whole running of the municipality is in the hands of the factions and it helps them to grow. The parties fake the voters' lists and corrupt the electors. They intrigue to get their partisans into municipal offices and when the council actually meets, its proceedings consist of nothing but rows, points of order, irrelevant resolutions and walkings-out by way of protest. That is not local self-government, it is local anarchy.

Def. C.: I see; and your point is that an agency for promoting local anarchy is..............

A. R.: Is not entitled by law or common sense to require me to pay for its activities.

Def. C.: Thank you, Mr. Ramayyar. That is all I have to ask you.

Plff's. C.: Mr. Ramayyar, I think you were an unsuccessful candidate at the last municipal election?

A. R.: I was, I am ashamed to say, and I am very glad that I didn't get in.

Plff's. C.: I put it to you that you are disgruntled because you have lost the opportunity to take part in those activities for which you blame the present council.

A. R.: Nothing of the kind. I wouldn't have anything to do with such a crowd. They aren't town councillors—they are town scoundrels!

(*Uproar. Shouts of "Silence."*)

Judge: Mr. Ramayyar, You must not let your enthusiasm for the purity of the local administration lead you into verbal excesses.

A. R.: I'm sorry, Your honour, but I feel very strongly on these matters.

Judge: Quite! Proceed, Mr. Charjam Ayyar.

Plff's. C.: Mr. Ramayyar, you have a cousin who deals in kerosine oil?

A. R.: Well, what if I have?

Plff's. C.: I suggest that he tendered unsuccessfuly for the municipal lighting contract?

A. R.: How do I know? I don't run my cousin's business.

Plff's. C.: Of course you don't know. But you do know that you have a nephew called Velaiyillathavan, who is now unemployed?

A. R.: Yes, but..............

Plff's. C.: One moment, Mr. Ramayyar. I suggest to you that he applied for a post as attender in the municipal office and that his application was rejected?

A. R.: Nothing of the kind. He is staying at home because he is reading for the I.C.S.

Plff's. C.: Really! And what are his qualifications for that distinguished service?

A. R.: He has passed one part of the intermediate exam. and he knows typewriting.

Plff's. C.: Excellent! He is sure to be made a Collector in a year or two. I suggest to you that your real reason for not paying this tax is that you hadn't got the ready cash.

A. R.: That isn't true. I'm not a penniless waster like most of your clients.

Plff's. C.: Well, Mr. Ramayyar, since you are determined to be impertinent, I don't think I need ask you any more questions.

Def. C.: I call Mr. Newspaperwalla.

Clerk: Please repeat after me.

(*Clerk and witness both gabble the oath together.*)

Def. C.: The Newspaperwalla, what are you?

N.: I am the editor of the Yengeyo Gazette.

Def. C.: In that capacity, do you attend the meetings of the municipal council?

N.: Yes—when I can't get anyone else to do it for me.

Def. C.: Did you attend the meeting of 6th January?

N.: Yes I did, for my sins!

Def. C.: What business did the council transact at that meeting?

N.: None at all. As soon as the meeting began, one member rose on a point of order. A wild altercation followed. There were scenes of disorder lasting for two hours. Two members retired with bleeding noses and the proceedings terminated without any resolution being moved or passed.

Def. C.: I think you attended the meeting held on 8th February. Can you tell us what business was done on that occasion?

N.: The proceedings began with a resolution calling attention to the ill-treatment of dhobies' donkeys by Italian volunteers attached to General Franco's army. The council spent three hours discussing whether the resolution should be confined to dhobies' donkeys or should cover donkeys generally. The majority favoured the view that the council had a duty towards all donkeys and the resolution was amended accordingly and passed. There was no time for the rest of the agenda which was adjourned to the next meeting.

Def. C.: I understand that you also attended the next meeting held on 14th March?

N.: Unfortunately I did.

Def. C.: Why was it unfortunate?

N.: Because it was a waste of time. The meeting started an hour late. It began by the Chairman asking for sanction for Rs. 200/ for repairing Kachikkaran Lane—where his own house is. A member of the opposition protested against this expenditure when nothing had been done to supply gramophones to prisoners in the Central Jail. When the Chairman ruled that this protest was irrelevant the opposition walked out in a body and the meeting was adjourned for want of a quorum.

Def. C.: At these three meetings which you attended, would you say that the municipal council performed any of the functions for which it was elected?

N.: Emphatically not.

Def. C.: Thank you, Mr. Newspaperwalla.

Pltf's. C.: Am I right in supposing, Mr. Newspaperwalla, that you are not only the editor of your widely-read journal, but also the sub-editor, the reporter, the printer and the advertisement manager?

N.: Well I must admit that I am rather a Jack-of-all-trades.

Pltf's. C.: You used to receive advertisements from the Yengeyo municipality?

N.: Yes.

Plff's. C.: Am I right in saying that they have now been taken away from you and given to the Yengeyo Morning Post?

N.: I don't know. I never read that rag. We aren't getting the advertisements now; that is all I know.

Plff's. C.: How annoying for you! Now Mr. Neswpaperwalla, I think you have a brother-in-law who is a doctor.

N.: I have.

Plff's. C.: Is it true that he was dismissed from service under the municipality because he was demanding money from patients at the dispensary?

N.: That was the false story they made up. The real reason was that he refused to get up in the middle of the night to poultice a boil on the seat of the Chairman's nephew.

Plff's. C.: Well, that is your version. Now I think you were formerly working as a journalist in Bombay.

N.: Yes.

Plff's. C.: Isn't it true that you left Bombay to avoid being prosecuted for bribery at the municipal elections.

N.: It's a lie! Your honour, I protest at these outrageous accusations! I demand..............

Judge: I'm sorry, Mr. Newspaperwalla, but counsel has to ask these unpleasant questions if he is instructed to do so. Any further questions, Mr. Charjam Ayyar?

Plff's. C.: No, your honour, I don't think I need outrage the witness by any further revelations of his past.

Def. C.: I close my case.

Plff's. C.: Your honour, I scarcely think that any formal opening of the plaintiff's case is necessary. The defendant admits that the tax is legally due, but denies that the plaintiff council is qualified to collect it. I claim that the allegations against my clients are false and malicious and that even if true they provide no defence to the plaintiff's suit. I assert that the Yengeyo municipality, though it may not be perfect, is honestly endeavouring to discharge its legal functions for the benefit of the people of this town. I will call Mr. Zubberdusti Mudaliar, Chairman of the Municipality.

Clerk.: Please repeat after me...

(*Repeats oath.*)

Plff's. C.: Mr. Zubberdusti Mudaliar, you have been chairman for how long?

Z. M.: For the last three years.

Plff's. C.: While you have been chairman, how many resolutions has the council passed?

Z. M.: I find that the total figure is 597.

Plff's. C.: How many miles of street have been repaired?

Z. M.: 15 miles 7½ furlongs.

Plff's. C.: What amount has been collected by way of taxes?

Z. M.: Just over 1¼ lakhs.

Plff's. C: Is it true that the municipality has been encouraging disease and dirt, leaving taxes uncollected and fomenting faction and disorder?

Z. M.: It is a downright lie and the man who says it deserves to be....................

Plff's. C.: I think we had better leave his honour to say what our opponent deserves. I have no further questions.

Def. C.: Mr. Zubberdusti Mudaliar, you say that you have collected 1¼ lakhs of taxes. Can you tell me how much you have failed to collect?

Z. M.: I can't say off-hand. There are always a lot of troublesome people like the defendant who won't pay till they are forced.

Def. C.: Let us leave the defendant's arrears for a moment. He makes no secret about them. But you, Mr. Zubberdusti, can you tell me when you last paid your own property tax?

Z. M.: I pay my taxes as soon as the demand comes.

Def. C.: Precisely—and in your capacity as Chairman you take good care that no demand ever reaches you.

Z. M.: I protest! It is a scandal! I................

Def. C.: Please don't work yourself into a state of righteous indignation. Let me put it this way. Is it not true that during the whole of your term of office, no single demand for any tax of any kind has ever reached you?

Z. M.: How can I remember? All I know is that I pay my taxes whenever they are demanded, like any other good citizen.

Def. C.: Only, unlike most good citizens, by some strange accident the demands never reach you! Well, we'll leave it at that. I put it to you that no demands for taxes are ever served on any of the members of your party in the council?

Z. M.: It's a lie!

Def. C.: So you say. Now I will turn to another matter. How often during your term of office has it been necessary for the police to intervene at meetings of the council?

Z. M.: Never.

(*Shouts of protest. Cries of "Silence."*)

Def. C.: You swear that the police have never intervened?

Z. M.: No, I don't say that. I say that it was never necessary for them to intervene. If an officious sub-inspector chooses to butt in at a council meeting, I can't stop him.

Def. C.: I put it to you that you yourself have twice sent for the police to put a stop to free fights amongst the members?

Z. M.: I may have. I don't remember.

Def. C.: I may take it that scenes of disorder are so frequent that they make no permanent impression on your memory. You say that you have repaired over 15 miles of street. That includes the Kachikkaran Lane in which you live?

Z. M.: Yes. That is one of the many streets repaired.

Def. C.: You made a very good job of the Kachikkaran Lane?

Z. M.: Yes, of course.

Def. C.: I suggest that when you take up the repairs of streets in the poorer quarters of the town, the money all goes into the pockets of contractors, maistries and councillors and that the streets are no better than they were before the repairs started.

Z. M.: If you want to give evidence, why don't you come into the box? It isn't true.

Def. C.: I put it to you that the death rate in the town has steadily risen since you became Chairman?

Z. M.: I can't help it if God sends epidemics.

Def. C.: But can you blame God for letting the drains get stopped up and letting sewage into the water supply?

Z. M.: I deny that the drains are stopped up. It's a libel. You've no right to.........

Def. C.: That will do Mr. Zubberdusti. I have no more questions.

Plff's. C.: I call Mr. Bakshi Sahib.

(*Clerk administers oath to Bakshi Sahib.*)

Plff's. C.: Mr. Bakshi Sahib, you are the overseer of the Yengeyo municipality and your duty is to supervise the sanitary and engineering staff?

B. S.: Yes, Sir.

Plff's. C.: Is it true that the drains of the town have got all blocked up, so that they are no better than cess-pools?

B. S.: No, Sir.

Plff's. C.: Is it true that money allotted for repairs of streets in the poorer quarters all goes into the pockets of contractors, maistries and councillors?

C

B. S.: No, Sir. It is properly spent on the works.

Plff's. C.: Thank you, Mr. Bakshi Sahib, That is all I have to ask you.

Def. C.: Mr. Bakshi Sahib, when you say that the money doesn't all go into the pockets of contractors, maistries and councillors, do you mean to suggest that a lot of it goes into your own pocket?

B. S.: No I don't. I am a poor man, but I am honest.

Def. C.: You are generally known as Baksheesh Sahib, aren't you?

B. S.: People call me all kind of things, because I am good-natured.

Def. C.: I suggest that you are called Baksheesh Sahib, because no one can get anything done in the town without giving you baksheesh.

B. S.: I tell you, I am an honest man.

Def. C.: And also poor, I think you said. You built a new house for yourself last year, didn't you?

B. S.: No, it was my wife who got it built.

Def. C.: Did'nt she get it built by Cheetum Sahib, a municipal contractor?

B. S.: He does sometimes do contract work for the municipality, but I don't see how that matters.

Def. C.: Of course you don't. The house cost Rs. 7,000 didn't it?

B. S.: It may have. I don't know. It is n't my house.

Def. C.: What is your pay?

B. S.: Rs. 47-8-0.

Def. C.: Is your wife a rich woman?

B. S.: She raised a loan—she borrowed on pledge of her jewels.

Def. C.: I think she borrowed Rs. 2,000 from Panakkaran Chetti and that he is the man who recently got the municipal lighting contract?

B. S.: May be. It's no business of mine.

Def. C.: Didn't you buy 20 acres of wet land in your native village about 18 months ago?

B. S.: No, it was my wife who bought it.

Def. C.: Ah! The rich wife again! I suggest that the money came from your pickings out of the municipal road-mending contracts?

B. S.: It's a lie.

Def. C.: Well, shall we say that one of us two is a liar and leave it to his honour to decide which? Do you know Munian?

B. S.: You mean the man who lives behind the market? Yes I know him.

Def. C.: His three year-old daughter was drowned last January, wasn't she?

B. S.: I heard so.

Def. C: Is it not true that she was drowned because she fell into a choked-up drain and was sucked down into the mire?

B. S.: How do I know? I wasn't there. I'm not a nurse-maid to look after all the children.

Def. C: No and I hope you are not a murderer to kill all the children with your filthy drains. That will be all, Mr. Bakshi Sahib.

Plff's. C: May it please your honour, I do not propose to weary you with any lengthy address. For I submit that the defendant has entirely failed to show any reason why he should not pay the taxes lawfully demanded of him. My learned friend has talked of the mire in the municipal drains, but I venture to say that there has been more mud slung in this Court to-day by my learned friend, than there is in all the drains of this municipality. I feel that I should be failing in my duty to my clients and to the citizens of this town, if I did not protest with all the emphasis of which I am capable, against these scurrilous aspersions on the character of our leading townsmen and against these unjustifiable onslaughts upon the good name of this town, of which I am proud to be a native. I say in all seriousness that my learned friend's cross-examination has been nothing less than a continuous series of defamatory insinuations, which I challenge him to repeat outside the four walls of this Court. If he has the temerity to accept this challenge, my learned friend will soon find himself appearing in Court in a different and less profitable capacity. To my mind it is outrageous that public men, sacrificing their time and talents for the common good, should be rewarded by such scurrility.

(*Cheers and groans and cries of "silence."*)

But, your honour, suppose I assume, merely for the sake of argument, that there is some shadowy substance in the defendant's unfounded allegations against the conduct of the municipal administration. What is the effect of these allegations on this case? I submit that they are absolutely and entirely irrelevant. The law has invested this municipality with powers to impose and collect taxes. My contention is that so long as the council and its officers follow the procedure laid down in the Act, the tax-payers cannot resist the demand by alleging that the money is being ill-spent or that the local administration is inefficient. I therefore ask your honour with some confidence to give a decree to the plaintiff for the amount of the claim with costs.

Def. C.: My learned friend's indignation, your honour, at the aspersions which I have been instructed to make upon his clients and their supporters, leaves me, if I may say so, with great respect to my learned friend, entirely unmoved. It is an old maxim of advocacy, that when you have got a bad case, you should abuse the lawyer on the other side. I have myself a good case so that it is unnecessary for me, even if I had the inclination to do so, to sink to my learned friend's level. I maintain that I have fully proved that the Yengeyo municipality is not a municipality in the eye of the law, any more than it is in the opinion of the public. I have demonstrated that its meetings are riotous and disorderly and that on the rare occasions when peace is maintained, the deliberations of the council are almost entirely devoted to matters unconnected with the welfare of the town. I have proved that instead of collecting taxes according to the law, which apportions the burden impartially to the means of the citizen, the members of this council have been practising an illegal system, whereby they themselves pay nothing and the whole burden of taxation is thrust upon the shoulders of their unfortunate fellow-citizens, whose interests these step-motherly councillors have been charged by law to protect. I submit that the defendant has adduced sufficient evidence to establish that the whole administration of this town is foul with the canker of corruption. And I maintain that it is not the object of the law to allow these architects of maladministration to build up their structure with funds wrung from the pockets of the poor. I ask your honour's pardon, if I have used language more emphatic than is customary in the dignified precincts of this Court. But fortunately it is not often that this Court has to listen to such a tale of degradation as has been unfolded before your honour to-day. I would respectfully remind the Court that my client is fighting, not merely his own battle, but the cause of the poor, the diseased, the downtrodden. I therefore ask your honour to dismiss this suit with costs.

(*Cheers from the back of the Court, gradually subsiding as cries of "silence" are heard.*)

Judge: This case has given rise to much excitement and controversy, but the issues which it raises are really very simple. The first question is whether the plaintiff municipality has conducted itself in such a way as totally to change its character and status so that it can no longer be legally described as a municipality in the strict sense of the term. The second question is whether, assuming the allegations of the defendant to be true, they afford a sufficient reason in law to justify the defendant in his refusal to pay taxes. Now, unfortunately the Act with which we are concerned contains no definition of the word municipality and once more it is the duty of the judiciary to supply the deficiencies of the legislature. However,

I think I shall not be far wrong if I define a municipality as a corporation empowered by law to supply the mental, moral and physical requirements of an urban community and to levy taxes for that purpose. The ease with which I formulate this subtle definition will doubtless make the public share with me the regret that the laws are made by legislators and not (as they obviously ought to be) by the Judges. Now what are the reasonable requirements of the people of a town? To mention only the most important, I would say good water, good roads, good drains and good government. To what extent have these requirements been supplied by the plaintiffs? We are told that the citizens have been given water polluted by sewage, drains which resemble cess-pools and are a death-trap to little children, roads which are repaired only if they lead to the houses of the favoured few, and a local administration which is a compound of corruption, disorder and irrelevance. Can a council, which devotes hours of public time to discussing the treatment of donkeys in Spain have any claim to be regarded as a *municipal* council, whatever may be its merits as an international association for the promotion of veterinary science? Is an organisation whose meetings are fraught with disorder, faction and recriminations, one which promotes the mental and moral welfare of the citizens committed to its charge? Can a corporation which collects heavy taxes from the poor and the fatherless, but lets its own rich members go scot-free, which repairs roads for its chairman and his partisans, but leaves its slums roadless, which uses funds raised from the meagre earnings of labourers, for the enrichment of its contractors and underlings—can such a corporation be legally described as a municipality? I have no hesitation in saying that it cannot.

Now the powers conferred by the legislature upon municipal councils are extensive, but they are not unlimited. Granted that our legislators frequently enact measures which reveal singularly little foresight and no skill in draftsmanship, they are not so utterly lacking in common sense as to impose upon our towns the despotic sway of a Hitler or a Mussolini. In legislating for our municipalities, they have prescribed certain powers and set forth, not perhaps in the happiest language, but with sufficient clarity, the objects for which those powers shall be used. Those objects are very wide, but they do not, unless I am grievously in error, comprehend the nurture of General Franco's asses or the maintenance of open cess-pools in the public streets. A municipal council is empowered to collect taxes from citizens according to their means, but it is not empowered to throw all the burden of taxation upon its political opponents. It is authorized to practise the arts of democratic government, not the arbitrary methods of a despot or a pirate. I do not for a moment say that a citizen would be justified in refusing to pay his taxes because

of mere allegations of inefficiency. But would he not be justified in resisting the demand for taxes, when the municipality has ceased to discharge those functions for which it was created and has given itself up to activities which are pernicious and anti-social? I consider that he is so justified. What is more, I say that the citizen who acquiesces in local misgovernment, is an accessory of disorder, failing in his duty to the state and to his fellow-citizens. It may be that the defendant and his supporters are inspired by motives unworthy of the cause which they have championed. But as an even greater judge than myself once remarked, "God alone knoweth the mind of man." This Court, not being endowed with divine omniscience, can only look at men's actions and say whether they be good or bad. Looking at the acts of the defendant and not seeking to delve into his motives, I find myself full of approbation for the courageous stand which he has taken against the twin evils of corruption and misgovernment. It is therefore with a firm conviction of the correctness of my decision, that I dismiss the plaintiff's suit; and I further direct that the defendant's costs be paid by the Chairman from his personal estate and not from the municipal funds. I would add that if ever this municipality is reconstituted as a true organ of local self-government, its first act should be to dismiss the overseer, Bakshi Sahib.

(*Cheers and cries of "Silence."*)

Some Quaint Obiter Dicta.—An old judge quoted by the late Augustine Birrell, who by the title of his two early volumes of essays gave a new and delightful significance to the expression "*Obiter Dicta*" explained that "an *obiter dictum* in the language of the law, is a gratuitous opinion, an individual impertinence which, whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it." No bad definition, it will be agreed, but doubtless the old judge who coined it was thinking merely of expressions of opinion thrown out in the course of the legal argument, and not strictly germane to the precise question which called for decision. *Obiter dicta* cannot, however, at all events for the present purpose, be limited to views thrown out from the bench as to the law involved in the particular case; they may roam over, and in fact do cover, an extensive area, indeed the whole range of thought. Thus we cannot forget that *dictum* addressed to a member of the bar whose submissions were interrupted by the judge in the words: "Mr. A., I never listen with any pleasure to the arguments of counsel whose legs are encased in light grey trousers." Those were the days when members of the bar were expected to be punctilious in the observance of the strict sartorial rules, days which have gone and given place to a laxity which would have astounded and pained our grandfathers and fathers. Again,

in a very different sphere, we recall the cutting observation of Lord Justice Knight Bruce, named in his day as the prince of judicial wits, who at the conclusion of an administration suit quietly remarked that "the estate will be distributed in the usual way among the parties' solicitors," thus following what has been called the true order of procedure in legal matters—costs first, then practice, and finally merits!—*L.T.*, *1940*, *p. 43*.

Bowen's Witty Obiters.—What may with justice be included among judicial *obiter dicta* or rather *obiter scripta* was the letter sent down from the bench by Bowen to Buckley, Q.C., whose name was inseparably linked to his classic treatise on company law, a subject on which he was a past master. The story goes that Buckley was appearing before Bowen, and in the course of the day Bowen sent down a note to Buckley asking him to dinner. Buckley replied thanking the judge for the invitation but expressing regret for his inability to accept it inasmuch as he was hourly expecting an addition to his family. To this came a second note from the bench couched in these terms: "I congratulate you on the projected issue of a new memorandum of association"! No one but Bowen could have utilised the occasion for so appropriate a reply; but he was indeed one in a thousand, a master of language and a cheery wit. Again, no one will forget his suggested emendation of the address by the judges to her late Majesty, Queen Victoria, on the occasion of her jubilee. The draft contained the sentence, "Conscious as we are of our imperfections." To this Bowen demurred and suggested that it might, however, be thus amended: "Conscious as we are of each other's imperfections." A great classical scholar and a master of his native tongue, he doubtless looked with little favour on the judicial utterances of his brother judge, A. L. Smith, a great lawyer and great judge, no doubt, but Bowen put his finger on the lack of distinction in that colleague's pronouncements when he said, "There is a distressing nudity about A.L.'s judgments." A.L. was certainly not a master of clear expression and did not in this sphere resemble John Bright, the clarity of whose speeches Kinglake accounted for by the fact that he never had enjoyed the disadvantage of a classical education.—*L.T.*, *1940*, *p. 44*.

Lord Darling's Obiter.—To write of *obiter dicta* and to leave out the late Lord Darling as a prolific producer of witty touches which contributed much to the delight of visitors to his court as well as of all save perhaps those who may have been the victims of his wit, would very much resemble presenting the play of Hamlet and leaving out the title role. His jokes were many, possibly too copious, but the great majority of them were of excellent calibre sparkling like gems,

Thus, we have his very witty comment on the ancient maxim, "*Ne sutor ultra crepidam,*" namely, that it has no application to those exercising judicial functions; it applies only to sutors. With a sense of sadness we also recall his enquiry of the late lamented J. B. Matthews whose exuberance and rapidity of diction were probably without parallel. It seems that the judge noticed J. B. coming into the court and taking his seat in the front row, whereupon, in his most dulcet tones, he said, "Oh, Mr. Matthews, can you, without undue prolixity, tell me, are you in the next case?" In one of his early incursions into the field of political science he remarked, with his accustomed wit, that "what recommends party government is that it enables us to slander our rulers without sedition, and overthrow them without treason."—*L. T.*, *1940*, *p. 44*.

At the Bar.—We usually and properly regard an *obiter dictum* as an utterance from the bench, but occasionally we find one coming from some member of the bar in addressing the judge, though in these circumstances it lacks even the slight authority the *dicta* of a judge may carry. Of witty utterances in this genre from the bar we may certainly include the definition of an affidavit given by a distinguished Chancery silk, namely, that "it is a document skilfully drawn by counsel, to the truth of which the deponent more or less willingly swears." Even in the reports, which are usually accounted very sedate productions offering no scope for frivolity, we occasionally light upon a bright patch which may well be designated an *obiter scriptum*, such as that footnote appended by Macqueen to his report of *Reid* v. *Battonshill Coal Company* and *McGuire* v. *The same company*, namely this, "Reid and MacGuire were victims of the same accident, which, though melancholy, has settled the law." In the same line of country we find Sir Gregory Lewin annotating his reports in this fashion: "Possession in Scotland evidence of stealing in England," and "A party is bound to retreat by a back door to avoid a conflict."—*L. T.*, *1940*, *p. 44*.

House of Lords Appeals.—Despite the partial embargo which in recent years has been placed upon the right of a litigant to go from the Court of Appeal to the House of Lords, there seems to be very little, if any, diminution in the number of cases which find their way to the Lords to hear the last word on the subject of the litigation. In this we have another illustration of that hope which, the poet assures us, springs eternal in the human breast. The sittings of the House in its judicial capacity were resumed recently with a list of twenty-two cases, four coming from Scotland. These sittings were particularly interesting in that the Lord Chancellor, Viscount Caldecote,

presided for the first time at the hearing of the appeals. For some time he has been presiding in the Judicial Committee of the Privy Council, but not until this term did he make what may be termed his judicial debut in the Lords. In accordance with precedent, he wore his robes and full-bottomed wig, whereas it is not the practice of the Lords of Appeal in Ordinary to appear otherwise that in civilian dress.—*S.J.*, *1940*, *p. 85*.

Legal Representation before Hardship Tribunals.—A recent writer to *The Times*, speaking from his experience as a chairman of an exemption committee during the last war, provides an interesting commentary on the remarks made by Mr. Randle F. W. Holme, President of the Law Society, at the recent special general meeting of that body, reported in our last issue. The writer heard between 2,000 and 3,000 applications for exemption, and states that he can well remember that the labours of the committee were lightened and shortened when the applicant had legal assistance. His case was put before the committee better than, in most instances, he could put it himself. An application to a hardship committee, the same writer urges, is in the majority of cases an important event in a man's life. He has probably never appeared before any tribunal, and it is difficult for him to put his case himself. Often he is tongue-tied, or very apt to introduce matters which he thinks helpful to his application but which are really irrelevant. The writer often found on careful examination of the applicants appearing in person that the most meritorious cases were those where the applicants themselves were least able to state them. That all took up time, which the help of a lawyer would have avoided. "Further," the letter continues, "I do not see the object of preventing an applicant having a lawyer to represent him should he wish it. The expense does not fall on the State. If the applicant is to have any help at all, I cannot see that the trade union official or a relative or a personal friend is better qualified than the applicant's own solicitor or counsel." It is urged, moreover, that the difficulty of deciding these hardship cases increases when the older men are called up, particularly those of between thirty and forty years of age who are married, with children, and have businesses of their own—all factors that a hardship tribunal has to take into account when listening to an application. The writer concludes by expressing the hope that it is not too late for para. 18 of the National Service (Armed Forces) Miscellaneous Regulations, 1939 (which provides that no applicant to a hardship tribunal may be represented by counsel or solicitor), to be reconsidered.—*S.J.*, *1940*, *p. 85*.

Relating to Children.—A notably superfluous passage in an affidavit read recently in the Chancery Division caused Mr. Justice Farwell to remark: "It seems a little unnecessary for a lady to say that she

was present at the birth of her own infant. One assumes that usually. It is difficult to see how she could have been anywhere else." Oddly enough, this point is not free from authority, for no one has put the principle underlying the matter more eloquently than O'Brien, J., in the concluding passage of his judgment in *Walker* v. *Great Northern Railway Co. of Ireland*, 28 L.R. Ir. 69, at p. 83: "In law, in reason, in the common language of mankind, in the dispensations of nature, in the bond of physical union and the instinct of duty and solicitude on which the continuance of the world depends, a woman is the common carrier of her unborn child, and not a railway company." In this connection one is reminded of the lady who, when asked in a court of law how many children she had had, replied: "Four, to the best of my knowledge, information and belief." Then there was the case of the man who was being tediously cross-examined before Mr. Justice Darling. He had been asked how many children he had had, and replied two. Later on he was asked the same question again, and the judge intervened: "He told you he had two children a few moments ago. There are hardly likely to have been any fresh arrivals since."—*S.J., 1940, p. 93.*

Particularity.—Pleadings and affidavits now and then produce oddities of assertion. The Court of Appeal was once considerably amused by a paragraph in a defence signed by Edward Buller: "The defendant denies that he is the father of the said twins or of either of them." He explained that that particular gem of precision was due to an accident in his pupil-room, but the style of the master hand was clearly recognisable. The late Sir Arthur Underhill, in his memoirs, recalled how once in the Court of Vice-Chancellor Bacon a particularly solemn silk read out an affidavit which began: "I am eighty-two years of age and have had eighteen children and no more." At that point the judge interrupted the reading, exclaiming: "Give him time, Mr. Horton-Smith, give him time."—*S.J., 1940, p. 93.*

Judges and the Poetic Muse.—Although we instinctively regard members of the Bench as concerned almost exclusively with the consideration and solution of the many legal conundrums which are submitted to them, rather than with such an apparently antithetical matter as courtship of the poetic muse, it is nevertheless interesting to discover that not a few of our judges have dallied with verse, and have given forth some happily inspired lines oftentimes glinting with an exquisite humour. Even Baron Parke, a great master of the common law and so absorbed in it as, according to the legend, to have taken a "beautiful demurrer" to the bedside of a sick friend to cheer him into convalescence, and who, on being asked if he had written any books, answered with becoming gravity that his works

were to be found enshrined in the serried row of volumes for which Messrs. Meeson and Welsby were responsible, could at times unbend and pen some witty lines. When, for example, his old friend Sir David Dundas was appointed Solicitor-General, Parke sent his congratulations, and with these an invitation to dinner for a certain evening. Sir David replied thanking Parke for his kind letter, but expressing regret that he would be unable to accept the invitation seeing that he had been already invited by no fewer than seven peers for the same evening. This evoked from Parke the neat rejoinder:

> "Seven thriving cities fight for Homer dead
> Through which the living Homer begged his bread,
> Seven noble lords ask Davie to break bread
> Who wouldn't care a d—were Davie dead"!

To those of us who know Parke only in his judgments packed with learning such as few of his colleagues could boast, it comes with something of a surprise, but a pleasant one, that he could throw off piquant lines such as those indited to his friend Dundas.—*L.T., 1940, p. 102.*

BOOK REVIEWS.

MUHAMMADAN LAW by Faiz Badruddin Tyabji, M.A., Barrister-at-Law. Published by N. M. Tripathi & Co., Bombay (III edition), (1940). 1056 pages. Price Rs. 20.

Mr. Tyabji's book has for long been regarded as an exhaustive and standard treatise on the law applicable to Muslims in India. Its scheme is to treat the whole subject in the form of the sections of an enactment containing the statements of law as established by the texts and judicial decisions succinctly, and to give their exposition elaborately under each section. The task of the learned author has been rendered particularly difficult in view of the existence of several superior Courts of co-ordinate status in the country and the conflict of decisions consequent thereon. In the circumstances therefore the citation of cases had, as the author has pointed out, to be selective rather than exhaustive.

The legislature has during the last decade passed a number of important enactments affecting the Muhammadan Law, modifying the pre-existing law. The Bengal Wakf Act of 1934, the Shariat Act of 1937, the Cutchi Memons Act of 1938, and the Dissolution of Muslim Marriages Act of 1939 are a few of such enactments. Almost all these have been noticed by the learned author and their principles incorporated in the statement of the law relating to the concerned topics. The full text of seven such enactments has been given as an appendix, thereby adding to the utility of the work. It should certainly have conduced still further to the exhaustive character of

the treatise if the provisions of the Bengal Wakf Act of 1934 and those of Acts like the Child Marriage Restraint Act had also been referred to.

On some points the information given could have been made fuller. On p. 62 it is mentioned that till the passing of the Shariat Act in 1937, several families of the Mapillas of North Malabar were subject to the Marumakkatayam customs, though they were all Muslims. The statement overlooks the fact that ever since the passing of the Mapilla Succession Act, 1918, the Mapillas are governed in matters of succession by the Muslim law and similarly from 1928 when the Mapilla Wills Act came into force it was the Muhammadan Law of Wills that applied to that community. On p. 112 it has been stated that the husband has a right under Muhammadan Law to chastise his wife moderately, though the right will have to be exercised with circumspection. The decision in In re *Subbiah Goundan*, 165 I.C. 330=A.I.R. 1936 Mad. 788, laying down that no such right is now-a-days recognised by law and that wife-beating is not *eo nomine* one of the exceptions in the Chapter mentioning the General Exceptions in the Penal Code, seems to have escaped notice.

The author states on p. 99 that "the salutary rule laid down in *Hassan Kutti's Case* (52 Mad. 39), will, it is hoped, not be questioned when similar cases arise again," the rule being that the marriage of an adult virgin governed by the Shafi Law, contracted by her father without her consent is not valid. The author's hope has to some extent been realised by the same view being taken by the Bombay High Court in 41 Bom.L.R. 1020=A.I.R. 1939 Bom. 489, a decision which does not seem to have been noticed in the book.

The exposition of law is throughout lucid and illuminating. Copious references have been made to the original textual authorities and to the way in which many of the points have been dealt with in other systems of law. The book should prove greatly useful to lawyers and students alike.

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MADRAS LAW JOURNAL.

II] AUGUST [1940

PROFESSIONAL CONDUCT AND ADVOCACY.*

We have great pleasure in commending to the legal profession a recent valuable publication by the Madras Bar Council on Professional Conduct and Advocacy. The book is a reproduction of a series of lectures delivered on the invitation of the Bar Council, in November 1939, to the Apprentices-at-Law of the year, by Rao Bahadur K. V. Krishnaswami Aiyar, a leading member of our Bar and a member of our Editorial Board. The book has every claim to be regarded as an authoritative exposition of the various problems pertaining to the practice of the legal profession.

The lecturer has carefully avoided the role of a pulpit-orator delivering a sermon but has proceeded throughout as a true guide to the new entrants into an already overcrowded profession. The plan and arrangement of the subjects are well laid out and the treatment is clear and lucid. In the analysis of the intricate problems which must be faced by the young lawyer the lecturer has displayed a clarity of vision and a mastery of detail born of his rich and varied experience. His answers and wise guidance in regard to many points may be said indeed to be the last word thereon.

The young lawyer is given a practical outlook on his profession with a keen eye to his moral and material well-

* Published by The Madras Bar Council; Price Rs. 3; concession to Advocates at Rs. 1-8-0 and to Apprentices-at-Law at Re. 1, obtainable at the Madras Law Journal Office, Mylapore.

being. The book can well be regarded as the young lawyer's 'Bible.' If indeed the young lawyer imbibes the ideas and ideals of the lecturer, he cannot fail to make a mark in the profession.

On some of the difficult questions of professional propriety the lecturer has given practical answers, though different views may be possible. On the question as to the stipulation of a contingent fee the lecturer has expressed himself against it, though Mr. Justice Sundara Aiyar would make an exception in the case of poor clients with heavy causes. In the higher interests of the profession the lecturer has not hesitated to differ from the learned Judge. The question as to whether a lawyer can defend a criminal whom he knows or has reason to believe to be guilty of the charge against him is as old as the profession itself on which different views have been expressed. The lecturer rightly takes the view that public interest demands that no practitioner shall decline to accept a retainer offered on behalf of the accused, though as regards civil cases the better opinion, according to him, is that the practitioner is under no similar obligation unless the refusal of the retainer would lead to injustice.

The recent decision of the House of Lords in *Myers* v. *Elman*[1], seems to introduce complications in the distinctive relations of a lawyer towards his clients on the one side and the Court on the other, and requires careful examination.

The charm and simplicity of the style is another remarkable feature of these lectures.

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1. (1940) A.C. 283.

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II] SEPTEMBER [1940

REFLECTIONS ON MYERS *V.* ELMAN, (1940) A.C. 282.

[We pointed out in these columns sometime back that a careful examination of *Myers* v. *Elman* was necessary for elucidating the possible complications which the speeches of the learned Law Lords in the case might give rise to in the matter of the distinctive relations between counsel and client on the one hand and between counsel and court on the other. We are glad to publish hereunder an exposition of that case by Rao Bahadur K. V. Krishnaswami Aiyar.]

I

The recent pronouncement of the House of Lords in *Myers* v. *Elman*[1], has important bearings on Professional Conduct and calls for studied appreciation and careful understanding.

In that case, after the successful termination of an action founded upon conspiracy and fraud of the defendant, in which the plaintiff obtained a decree for a substantial amount, the plaintiff, who could recover nothing towards his decree from the defendant, applied to the court to order and direct the solicitor for the defendant to pay him his costs of the action on the ground that the solicitor had been guilty of professional misconduct. The applicant laid two charges against the solicitor; one, that he "delivered defences which he must have known or suspected to be false" and the other, that, he prepared and permitted his client, the defendant "to make affidavits of documents which were inadequate and false." Various points were raised in support of the defence; but the principal amongst them were (1) that while there were rules of court giving jurisdiction to make orders relating to costs as between a solicitor and his client, there was no jurisdiction under which a party could ask for an order relating to costs against the solicitor appearing for the opposite party, and (2) that in the particular case, the solicitor had left the conduct of the proceedings largely to his managing clerk, who was a solicitor's clerk of ability and experience and that he was personally innocent of the accusation.

The trial judge, Singleton J., held that the solicitor was not guilty of professional misconduct in filing defences which put in issue

1. (1940) A.C. 282.

the charges of fraud and conspiracy against his client. But the learned judge found that the solicitor and his clerk "knew a great deal about the matters in question," and "as a result of a deliberate policy" adopted in the solicitor's office "in the conduct of the defence and in relation to discovery," the solicitor "increased the plaintiff's difficulties, added to the expense and obstructed the interests of justice, " and that he was in consequence guilty of "professional misconduct as a solicitor and an officer of court" and directed that he should pay to the plaintiff a share of the costs of the original action and the entire costs of the application.

On appeal, the Court of Appeal, Greer and Slesser L.JJ., Mackinnon L.J., dissenting, reversed the order of Singleton J. They observed that, assuming that the solicitor could be held liable for professional misconduct if he had done the act complained against personally, he was not liable in this case "inasmuch as he had appointed a fully qualified clerk to do such business and the act had been done not by the solicitor himself but by his clerk."

Before the House of Lords the appeal was heard by Viscount Maugham, Lord Atkin, Lord Russell, Lord Wright and Lord Porter. All the noble and learned law lords, except Lord Russell, agreed in reversing the decision of the Court of Appeal and restoring that of Singleton J. But Lord Russell differed on the question of fact, whether the evidence tendered established the charges. On the question of the existence of the jurisdiction to make the order and the duties and obligations of solicitors in acting for parties, he agreed with Viscount Maugham.

Viscount Maugham dealt first with the nature and scope of the jurisdiction. He held that the jurisdiction of the court to order a solicitor to pay costs personally was very different from the jurisdiction to strike him off the rolls or to suspend him, a jurisdiction which was strictly personal and related to the solicitor himself and his fitness to practice, and that in the former case, the court was merely exercising its jurisdiction over an officer of court and enforcing his duty to the court. The order to pay costs had also a twofold purpose to serve. It was not merely to punish the solicitor but also "to protect the client who has suffered and to indemnify the party who had been injured," and misconduct or default or negligence in the course of the proceedings was in some cases sufficient to justify such an order. The learned Viscount went on to say that if the solicitor's negligence in the discharge of his duty as an officer of court was sufficient to invoke the jurisdiction, he could not shelter himself, behind a clerk, for whose actions within the scope of his authority, he was liable. He concluded with the expression of his concurrence with Singleton J., that the solicitor was guilty of "pro-

fessional misconduct in not insisting on his client disclosing the relevant documents" and "in preparing and putting on the file affidavits of documents which he knew to be very inadequate."

Lord Atkin said that the words "professional misconduct" themselves are not necessarily confined to cases where the solicitor himself is personally guilty. After all they only mean misconduct in the exercise of the profession; and they cover cases where a duty is owed by the solicitor to the court and is not performed owing to the wrong doing of the clerk to whom that duty has been entrusted. The confusion in the Court of Appeal, had arisen from the fact, that charges of professional misconduct have been generally brought up by a special procedure. He added. "It seems to be quite incorrect to suppose that the cases in which solicitors have been ordered to pay costs where there has been no personal complicity are cases in which, the court is exercising a kind of summary jurisdiction in contract or tort by way of awarding damages for breach of warranty of authority. The court is not concerning itself with a breach of duty to the other litigant but with a breach of duty to itself." He then put to himself the question "what is the duty of the solicitor" and answered it thus: "He is at an early stage of the proceedings engaged in putting before the Court on the oath of his client information which may afford evidence at the trial. Obviously he must explain to his client what is the meaning of relevance: and equally obviously he must not necessarily be satisfied by the statement of his client that he has no documents or no more than he chooses to disclose. If he has reasonable ground for supposing that there are others, he must investigate the matter; but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed to him. But I may add that the duty is specially incumbent on the solicitor where there is a charge of fraud; for, a wilful omission to perform his duty in such a case may well amount to conduct which is aiding and abetting a criminal in concealing his crime, and in preventing restitution."

Lord Wright said: "Alongside the jurisdiction to strike off the roll or to suspend, there existed in the Court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, sometimes those of the opposite party, sometimes, it may be, of both.....The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice....... It need not involve personal obliquity. The term, professional misconduct, has often been used to describe

the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the Court and to realise his duty to aid in promoting in his own sphere the cause of justice...... The jurisdiction is not merely punitive but compensatory." The noble and learned Lord then proceeded: "The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to."

Lord Porter said that he rejected the contention that the summary jurisdiction of the court extended to relief only in cases of personal misconduct and neglect of duty. "It is misconduct in the way in which the work entrusted to his firm is carried on, not the personal misdoing of the individual, which gives rise to the exercise of the jurisdiction...... The Court is not enforcing a civil right but exercising its authority over the conduct of its officer." The noble and learned Lord concluded: "In any case I do not consider that the solicitor or his clerk has fulfilled the obligation of supervising to the best of his ability the swearing of a full and complete affidavit of documents." Lord Russell of Killowen who disagreed with the majority on the finding of the facts said: "It is, I think, immaterial that no professional misconduct is attributable to Mr. Elman personally. He would nonetheless have failed in the discharge of the duty which he owed to the Court."

On the pronouncements above quoted, understood with reference to the facts of the case, there can be no difficulty in appreciating the rule of conduct enunciated by the House. Though the case related to a solicitor, the principles apply equally to a practitioner in this country who in addition to pleading in Courts acts for the party and therein performs the functions of a solicitor. But the decision itself enunciated no new standards of professional conduct which the legal profession did not have for their guidance earlier. The obligations of a practitioner to the Court enunciated in the pronouncements, were never understood to be in any way different and are as old as the profession itself. *Hill's case*[1], where a solicitor was punished for having put in for his client "a long insufficient demurrer to a bill

1. (1609) Cary 27 : 21 E.R. 15.

exhibited against his client in which supposed demurrer were many matters of fact and other things frivolous and vain" furnishes adequate proof.

Nor is the jurisdiction a novel or new creation of the House of Lords. Viscount Maugham's judgment and the citations that he makes amply show that the jurisdiction to order costs against a solicitor is founded on his duty to the Court. Referring to the obligations of solicitors, Lord Hatherly said in In re *Jones*,[1] that they have not merely to "perform their duties towards their own client but also towards all those against whom they are concerned" referring thereby to their duty to the court. The jurisdiction did not depend on disgraceful or dishonourable conduct of the solicitor but on a mere negligence of a serious character the result of which was to occasion useless costs to the other party. It is obvious that occasions for the exercise of such jurisdiction will be rare and *Myers* v. *Elman* properly reminds the profession of the existence of the jurisdiction and its implications.

It would be of interest to know that in *Maharajah of Vizianagaram* v. *Lingam Krishna Bhupati*[2], counsel for the petitioner was directed to pay the costs of the opposite side thrown away by his neglect in the lower court. The foundation of the jurisdiction was not, however, explained in the judgment and it was not stated in terms that the practitioner was either guilty of professional misconduct or that he failed to discharge his obligations as an officer of court.

II

The jurisdiction of the court to deal with the solicitor as for professional misconduct and direct him to pay the costs of the opposite party, is, as has been explained, founded upon the obligations which he owes to the court as its officer and his failure to discharge those obligations properly. This necessarily leads us to consider how far those obligations reach and to what extent they impinge upon his other duties which he has to perform for and towards the client for whom he acts and whom he represents. The decision of the House of Lords itself recognises a distinction between the obligations of the solicitor in making certain forms of pleadings or raising certain issues and his obligations in making and presenting an affidavit of discovery. The solicitor in *Myers* v. *Elman* was also charged with professional misconduct in that "he had delivered defences which he must have known or suspected to be false." Singleton J., held that the solicitor was not guilty of professional misconduct in allowing the defences to be delivered. The Court of Appeal affirmed that

1. (1870) L.R. 6 Ch. App. 497.
2. (1902) 12 M.L.J. 473.

view and stated that "it was not professional misconduct in a solicitor to prepare and deliver on behalf of his client a defence which he might himself suspect contained misstatements or raised false issues and put the plaintiff to proof of his case." In the House of Lords, which upheld the view taken by the courts below, Viscount Maugham said: "I think it useful to observe here that there is this plain distinction between defences which consist—as they did here—of a denial of allegations and of untrue affidavits of documents. The defences are not on oath and they merely put the plaintiff to the proof of the allegations in the statement of claim." He added: "However guilty they (the parties) may be, an honourable solicitor is perfectly justified in acting for them and doing his very best in their interests, with, however, this important qualification, that he is not entitled to assist them in any way in dishonourable conduct in the course of the proceedings." Lord Atkin described the duty owed to the court as one "to conduct litigation before it with due propriety." Lord Wright observed: "There may indeed be circumstances in which a legal adviser has taken such action or so comported himself on behalf of a client as to go further than an honest advocate or solicitor could properly go. It is difficult and perhaps impossible to formulate any principle which would afford a general definition applicable to such cases." Singleton J., wisely said: "Nothing ought to be said which may prevent or tend to prevent solicitor or counsel from doing his best for his client so long as his duty to the court is borne in mind. A client is entitled to have legal aid in order to put the other side to proof of the case against him, and to test and probe that case and the evidence addressed. Thus the client is entitled to say that he denies the fraud or other matters charged and to have that defence placed on the record. He is entitled to have professional aid in regard to the maintenance of that defence before and at the trial." He concluded: "It is not sufficient evidence of misconduct, taken by itself, that a solicitor continued to act in the action notwithstanding that he was aware or was put on enquiry that the defendants were or might be raising false issues in it." It would seem to follow from the foregoing that where the pleadings contain affirmative allegations which the practitioner knew or must have suspected to be false, it may amount to professional misconduct on the part of the practitioner. As Dr. Johnson said, counsel are not to state what they know to be a lie.

The range of acts which a solicitor or any practitioner in this country has to do on behalf of the client in the preparation and conduct of a cause is very wide. The making of pleadings is but a very small part of it. Where is the line to be drawn to demarcate his duties for breach or for even negligent discharge of which, he would be liable as for professional misconduct, from those other

duties of his, in respect of which he has a discretion to act in the best interests of the client, untrammelled by any other consideration? For, it is obvious that the functions of a solicitor are not exhausted by ascribing to him the character of an officer of court merely. He is essentially a trusted representative and an agent for the client and his character and obligations as an officer of court arise only out of this primary character which he possesses as an accredited agent and in the course of discharge of those primary obligations. He is only secondarily and only in part an officer of court. While in the discharge of his duties in and in relation to the court his action and conduct are circumscribed by the limitations which his character as an officer of court might impose on him, he does not continue to bear that character throughout in respect of all his other actings in relation to his client, or on his behalf. In other words a solicitor acting for his client is acting in a much larger sphere than what would be connoted by his relation to the court as an officer of it and the scope of his actions and conduct as solicitor for his client, is, by no means, coterminous with the range of his duties as such officer. To hold otherwise, would cut at the very root of the position of the solicitor in the scheme of the administration of justice as a necessary middleman between the client and the court and an accredited representative of the client for whom he appears. The House of Lords recognise this distinction that the practitioner has duties towards his client which fall outside his obligations to court and are untrammelled by them. It is obvious that no practitioner is employed by a client merely to confess judgment or deliberately to expose the weakness of his case in the supposed discharge of the practitioner's obligations to court. Where then is the scope for the lawyer to present his client's case at its best, employing tactics and strategy where necessary?

The decision of the House of Lords, gives liberty of action to the practitioner in the matter of making pleadings and raising defences and issues. But there are many other varieties of acts for which a practitioner has to undertake responsibility on behalf of the client. It is not possible to enunciate them seriatim. In fact, their number is legion. But as a guidance to ourselves, we may lay down the following. Let it be a first rule that honourable conduct in all matters is to be studied and practised. There need, however, be no assumption that the duty of absolute disclosure enunciated with reference to affidavits of documents applied in respect of all acts which a practitioner has to do on behalf of his client and that as soon as a fact or a document comes to the knowledge of the practitioner which militates against his own case and lends support to that of the adversary, the maintenance of his honour requires him to hand up his client, as it were, disclose the matter to the Court in the assumed

discharge of his duties as an officer of Court and solicit a judgment in favour of the opposite side. The line may therefore be drawn by enunciating that no practitioner acting on behalf of his client shall do anything with the object of using the Court for perpetrating a fraud upon the opposite party or doing manifest injustice to him and thereby seek to make the Court an instrument of fraud or oppression. Subject to this duty which he owes to Court, the practitioner must conduct himself as an honourable man maintaining fidelity to the trust reposed in him and properly discharging his contractual obligations to the client.

In the judgment of Viscount Maugham, in referring to the nature of the application before the Court it is stated that the application was "in the light of the evidence and of the facts disclosed relating to the conduct of the solicitors"...... "to exercise the Court's jurisdiction to pay the costs *so* recovered from their respective clients." (The italics are mine.) It is also mentioned in the report that the applicant was not able to recover anything from the opposite party. These facts may suggest that the applicant sought, that the solicitor should disgorge that which he had absorbed to such an extent as to leave his client flaccid, and by way of a tracing order. But it is obvious that any such suggestion is not warranted by the grounds of the decision. The order would have been made against the solicitor, even if he had not enriched himself at the expense of his client and even if that client were in a position to meet the original decretal obligation.

SUMMARY OF ENGLISH CASES.

NAAS (LADY) *v.* WESTMINSTER BANK, LTD., (1940) A.C. 366 (H.L.).

Deed—Settlement executed by one party—Failure of other party to execute or give release deed—Effect—Settlement—If revocable.

Where there is an absolute and unconditional settlement it takes effect at once by the act of the settlor's executing it. This is complete when he delivers it as his deed. Consideration is not necessary and the settlor cannot revoke it. In the present case the Court of Appeal held that the settlor executed the settlement on the faith that the settlor's wife would execute it and give a release for which he stipulated and since she had not in fact executed the deed and eventually returned it unexecuted, the deed does not bind in equity. The House of Lords found,

Held [reversing the decision of the Court of Appeal (1938) 3 All. E.R. 652 and restoring the decision of Morton, J.], the settlement was binding on the settlor although not executed by his wife. Statement in *Luke* v. *South Kensington Hotel Co.*, (1879) 11 Ch.D. 121 (125) held to be too wide.

LISSENDEN *v.* BOSCH, Ltd., 1940 A.C. 412 (H.L.).

Election—Receipt of amount allowed under award by workman—If 'election' barring right of appeal as to portion disallowed.

The doctrine of 'election' is applicable only to cases arising under wills and deeds and other instruments *inter vivos*. It cannot apply to judgments or awards. Payment by a defendant of what has been found to be due from him does not operate without more to prevent the plaintiff from appealing for some further relief. It may be true that an award under Workmen's Compensation Act, 1925, is "indivisible" if not appealed from, but it is not an accurate statement of the position pending appeal. Appellant can appeal against a part of the award. Receipt of the amount awarded did not amount to election to bar the right of appeal. *Johnson* v. *Newton Fire Extinguisher Co., Ltd.*, (1913) 2 K.B. 111, overr.

FIFE COAL CO., LTD., *v.* YOUNG, (1940) A.C. 479 (H.L.).

Workmen's Compensation Act (1925), *S.* 1—"*Injury by accident*"—*Meaning—Disease before date of incapacity—Effect.*

The pressure on the peroneal nerve (caused by the crouching position in which he had to work) during a spell of work brought about the paralysis of the claimant's muscles which is described as dropped foot. In a claim for compensation,

Held, the claimant sustained a definite physiological injury in the reasonable performance of his duties and as the result of the work he was engaged in at the time of the injury. The employee is entitled to compensation. Gradual and steady extension of the meaning of "injury by accident" traced. Authorities fully considered.

MELLOR *v.* AUSTRALIAN BROADCASTING COMMISSION, (1940) A.C. 491 (P.C.).

Copyright—Music—Performing rights—Consent or licence conferring—If includes right to broadcast.

Appellants' pamphlet stated: "We have paid for the performing rights of every piece." "All our music is free for public performance." "We make one price cover both the music and the performing rights thereof." Bands having bought the music published by the appellants played the musical works in public and some performances were broadcast by the respondent, a corporation. In an action for alleged infringement,

Held, broadcasting was included in "performing rights" and respondent was not liable.

LETHBRIDGE *v.* INDEPENDENT ORDER OF FORESTERS AND ATTORNEY-GENERAL FOR CANADA, (1940) A.C. 513 (P.C.).

Constitutional Law—British North America Act, 1867, Ss. 91 and 92—Acts of Provincial Legislature reducing interest on securities—Acts in "pith and substance" relating to "interest" under S. 91 and only indirectly relating to subjects under S. 92—Conflict with Dominion Act as to interest—Constitutional validity of the provincial Acts.

The legislative assembly of the province of Alberta passed three Acts:—(1) Alberta Provincial Guaranteed Securities Interest Act, 1937, reducing the interest on securities guaranteed by the province; (2) Alberta Provincially Guaranteed Securities Proceedings Act, 1937, providing that no proceedings should be brought in respect of such interest or in any way to enforce such security without the consent of the Lieutenant-Governor in Council; and (3) The Provincial Securities Interest Act Alberta (1937) reducing interest on securities issued by the province.

Held, the Acts relate in substance not to borrowing but to payment of interest in respect of existing debentures and other securities at less than the contract rates. In pith and substance it relates to 'interest' a subject under S. 91 (19) of the British North America Act, 1867. Also they conflict with a Dominion Act (Interest Act, 1927). All three Acts are *ultra vires* the Provincial Legislature.

CAMERON *v.* PRENDERGAST, (1940) A.C. 549 (H.L.).

Income-tax—Amount received by an assessee (a director from his company as consideration for not resigning his directorship)—Liability to income-tax as profit arising from the office of director.

A director of a company agreed to continue as director of the company in an advisory capacity in consideration of the payment of £45,000. On a question whether the appellant was liable to income-tax in respect of the sums,

Held, the payment was one arising from the assessee's office and liable to tax under Schedule E of the Income-tax Act.

Hunter v. *Dewhurst*, (1932) 16 Tax Cases 605, distinguished.

(JAMES) & MILLWARD CO., LTD., *In re*, (1940) 1 Ch. 333.

Companies Act (1929), S. 225—Voluntary liquidation—Judgment-creditor, if entitled to apply for compulsory winding up—Practice—Affidavit evidence founded on information and belief—Probative value.

Where a company is in voluntary liquidation a judgment-creditor is entitled *ex debito justitiae* to an order for compulsory winding up and he need not show prejudice if winding up upon voluntary lines was allowed to continue.

Clauson, L.J.—" Where the onus is on the person opposing the winding up I would place but little reliance upon the affidavit of a liquidator founded on information and belief where the directors conversant with the whole matter do not put in any affidavit and are shielded from cross-examination."

A. LEWIS & CO., (WESTMINSTER) *v.* BELL PROPERTY TRUST, LTD., (1940) 1 Ch. 345.

Landlord and Tenant—Covenant not to use adjoining premises for business of sale of tobacco, cigars and cigarettes—Premises let for use as tea shop where cigarettes were supplied to customers on the premises—If breach of covenant.

There was a covenant not to use adjoining premises for ' business of sale of tobacco, cigars and cigarettes.' The landlords let the adjoining premises to an A. B. C. Tea Shop who supplied customers cigarettes at the premises. In an action for damages for breach of covenant against the landlord,

Held, one cannot fairly predicate of the tea shop that they are carrying on upon the premises the business of selling tobacco, cigars and cigarettes and the action must fail.

CAMDEN NOMINEES, LTD. *v.* FORCEY, (1940) 1 Ch. 352.

Tort—Contract between landlord and tenant—Tenant's Association advocating the withholding of rent to redress grievances against landlord—Liability for inducing breach of contract.

If *A* without justification knowingly interferes with a contract between *B* and *C* he commits an actionable wrong. The plaintiffs were the owners of a block of flats let upon tenancy agreements which were in standard form, each agreement containing *inter alia* (*a*) an obligation on the tenant to pay his rent, and (*b*) certain obligations on the landlord including that of lighting the staircase and landings and keeping them properly cleaned and swept and of maintaining constant hot water and central heating. There were 62 tenants in the block. Certain tenants complained that landlords were not satisfactorily carrying out their obligations. Some of the tenants formed into an association. The two members who were active in forming the association were sued for endeavouring to persuade their fellow tenants to break their agreements by withholding rent. The defendants contended that they were justified on two grounds namely (1) that they and those whom they would persuade to break their contracts have a common interest in making the landlords perform their obligations, and (2) that because the tenants on one side were weak and the landlords on the other are strong and take advantage of their strength, it is justifiable to use the weapon which would otherwise be wrongful.

Held, the defendants had no justification and must be restrained by injunction and are also liable for damages.

BLAIBERG. *In re*: BLAIBERG AND PUBLIC TRUSTEE *v.* DE ANDIA YRARRAZAVAL AND BLAIBERG (1940) 1 Ch. 385.

Will—Clause for forfeiture on legatee "marrying any person not of the Jewish faith"—If void for uncertainty.

A codicil contained, *inter alia*, the following clause: "......... should any child or grandchild of mine at any time whether before or after my decease marry any person not of the Jewish faith such child or grandchild shall forfeit and be deprived of any interest or share under my said will or codicil and my said will or codicil thereto shall be construed as if such child or grandchild had been dead at the time of his or her contracting any such marriage." A granddaughter having married a person other than of Jewish faith, which marriage was later dissolved.

Held, the question whether or not a person is of the "Jewish faith" is something which lies in his or her own conscience and is a matter of belief. The condition is one far too uncertain for the Courts to give effect to and is void.

WILSON *v.* LONDON MIDLAND AND SCOTTISH RAILWAY CO. (1940) 1 Ch. 393.

Companies—Stamped proxies sent only to holders of stock of over £2,500 following the practice of the company—Object to ensure quorum—Smaller holders if legally entitled to claim equality of treatment and enforce it through Court—Proper remedy.

There were holders of stock to the amount of £1,000,000. What the directors did in practice was to send a stamped proxy to all holders who hold stock to the value of £ 2,500 and upwards. The object was to ensure the necessary quorum which was very large. It will take a good many stockholders of stock valued at less than £ 2,500 to make the necessary quorum. In a claim by smaller stockholders claiming similar rights,

Held, the question as to whether or not the practice is to be followed is a pure question of the policy of the company and the directors are entitled to take the course they did. If the stockholders think that the practice has to be changed they have to resort to ordinary constitutional methods in the company itself. They have no right to call for assistance from the Courts.

WELLS' WILL TRUSTS, *In re*: PUBLIC TRUSTEE *v.* WELLS, (1940) 1 Ch. 411.

Will—Annuity free of all deductions—If to be free of income-tax.

A gift was given by will in this form:—"I bequeath the following annuities free of duties to commence from the date of my

death of my said wife : an annuity of £ 350 during her life or widowhood to be paid free of all deductions by equal quarterly payments the first shall be paid three months after my death......"

Held, the annuity was not given " free of income-tax." 1939 Ch. 654, Not Foll.

REDDITCH BENEFIT BUILDING SOCIETY *v.* ROBERTS, (1940) 1 Ch. 415.

Practice—Defendant who had not entered appearance in time appearing at time of signing judgment and attempting to enter appearance—Judgment by default—If can be passed.

In an action on a mortgage the defendant had not entered appearance within time but received notice of application for leave to enter judgment in default of appearance. On the day fixed he wanted to enter appearance.

Held, a judgment ought never to go in default of appearance when the defendant is before the Court and whether he has technically appeared or not, is there and anxious to put himself in a position to defend.

BIRCHALL, *In re* : KENNEDY *v.* BIRCHALL, (1940) 1 Ch. 424.

Will—Bequest to children alive at testator's death and if any child shall die in testator's lifetime leaving child or children living at testator's death—Children of child dead at time of will—Rights of.

The testatrix provided that the residue of the trust moneys was to be held in trust for her children " living at my death........provided that if any child of mine......shall die in my lifetime leaving a child or children living at my death who being male attain the age of 21 years or being a female attain that age or marry, such child or children shall take the share which his or her or their parent would have taken if such parent had survived me."

Held, the children of a child already dead at the date of the will were entitled to share.

BOND *v.* NOTTINGHAM CORPORATION, (1940) 1 Ch. 429.

Easements—Support to adjoining premises—Removal by local authority without providing equivalent support after default by owner in carrying out clearance order—Liability to provide equivalent support.

The owner of a tenement is not entitled by his acts to remove the support to adjoining premises without providing an equivalent. Where the owner of the servient tenement fails to carry out a clearance order to demolish the premises and the local authority wants to demolish the premises, the local authority also is equally under an obligation to adopt that method of demolition which will not interfere

with the right of the owner of the adjoining premises to support from the building to be demolished. (1939) Ch. 847, affirmed.

CAPON, *In re* : THE TRUSTEE IN BANKRUPTCY *v.* KNIGHT & SONS, (1940) 1 Ch. 442.

Sale of Goods—Auctioneer providing funds for purchase of pigs—Purchaser removing pigs after signing note acknowledging receipt of the pigs (that pigs were auctioneers' property and could be removed and sold by them) —Bankruptcy of purchaser—Right to the pig.

Auctioneers had provided funds for purchase of pigs by a farmer who before removing them signed a note acknowledging receipt of the pigs and stating that pigs were auctioneers' property and could be removed and sold by them. On the bankruptcy of the farmer the auctioneers seized and sold the pigs and claimed to retain the sale proceeds against the trustees in bankruptcy. The auctioneers claimed that the farmer was their agent in the purchase of the pigs and the arrangement was to give them a security.

Held [affirming (1939) 4 All.E.R. 554], the farmer was not an agent of the auctioneers and the property in the pigs passed to him and the trustee in bankruptcy was entitled to the sale proceeds of the pigs.

A DEBTOR, *In re* : THE JUDGMENT CREDITOR *v.* THE JUDGMENT-DEBTOR, (1940) 1 Ch. 470.

Practice—Stay of execution "provided that 10 l. *be paid on the* 1*st February,* 1940 *and* 10 l. *per month thereafter"—Construction.*

An order contained the following provision :—

" And it is further ordered that execution be suspended provided that 10*l.* be paid on the 1st February, 1940, and 10*l.* per month "thereafter." The first payment was made on 1st February, and the next payment was not paid till 5th March. On 2nd March a bankruptcy notice was issued and the debtor applied to set aside the notice contending that he had the whole of the month of March in which to pay the second instalment and so there was no default.

Held, the word " thereafter " refers to the date on which the first payment is to be made namely 1st February and accordingly the last day for payment would be the 1st of every succeeding month and the application to set aside the bankruptcy notice must be dismissed.

TAYLOR, *In re* : MIDLAND BANK EXECUTOR AND TRUSTEE CO. LTD., *v.* SMITH, (1940) 1 Ch. 481.

Wills—Trust for voluntary associations—Validity.

A testator bequeathed his residuary estate in trust for the Bank staff association (a voluntary association) whose object was to give financial assistance to the past and present members of the staff or their dependants. The gift was directed to be held upon the trusts, set out in the constitution and rules of the association. It was contended that the gift was not charitable and was a gift to no named persons and the objects of the trust as found in the constitution and rules of the association were so vague and uncertain that the Courts cannot give effect to them and that therefore the residuary estate must be treated as undisposed.

Held, (1) the gift was not for charitable purposes alone; (2) the gift was to the association, that the hand to receive it being the trustee of that association; (3) where there is a gift to an unincorporated body of persons and nothing in the rules or the constitution of that body which prevents them from using the fund so given to them in any way they please, either by applying the capital or the income to any of the purposes therein set out or by putting an end to the fund altogether and distributing it among themselves the fact that there may be some difficulty in construing the exact meaning of the rules or the constitution is not a matter which can affect the validity of the gift itself.

SYKES, *In re*: YOUNGHOUSE *v.* SYKES, (1940) 1 Ch. 490.

Will—Option to purchase conferred by will—If can be exercised by executors of donee after his death.

Prima facie an option to purchase given by will to a named person is personal to him and does not pass to his executors or confer a transmissible interest. If the contrary is to be held there must be found, in the will giving the option, some indication that it is exercisable by the executors of the person to whom it is given.

In re *Cousins*, 30 Ch.D. 203, does support the proposition stated in Jarman on Wills, 7th Edition, Vol. I, at p. 73.

GILT EDGE SAFETY GLASS, LTD., *In re*, (1940) 1 Ch. 495.

Companies—Directors acting without requisite number of qualification shares—Liability for statutory penalties—Relief against future proceedings—Discretion of Chancery Courts to grant.

In consequence of reduction of capital of the companies the directors ceased to hold the requisite number of qualification shares but continued to act as directors. Proceedings were commenced against the directors by the respondents under Companies Act, 1929, S. 141 (5). The directors applied for relief from liability in respect of fines or penalties under S. 141 (5) and also in respect of future liability for acts done as directors.

Held, as the directors had acted honestly and reasonably they were entitled to relief against future liability. But their liability under the pending proceeding must be decided by those Courts.

GAUMONT-BRITISH PICTURE CORPORATION, LTD., *In re*, (1940) 1 Ch. 506.

Companies Act (1929), *S.* 135—*Inquiry into companies affairs by inspector appointed by Board of Trade—Examination of managing director—Presence of shorthand writer—If necessary—Refusal to answer question in his presence—Contempt of Court.*

A managing director, summoned by the inspector appointed by the Board of Trade to investigate the affairs of the company under Companies Act (1929), S. 135 refused to answer questions so long as any person (here a shorthand writer) other than the inspector was in the room.

Held, if it is a fact, that a shorthand writer to take down the proceedings as a record for the inspector's use in preparing his report is necessary then there is no question but that the inspector is entitled to have the shorthand writer present. The managing director is in effect guilty of contempt of Court. *Heart of Oak Assurance, Ltd.* v. *Attorney-General*, (1932) A.C. 392, Applied.

ROYCE, *In re*: TURNER *v.* WORMALD, (1940) 1 Ch. 514.

Wills—Legacy "for benefit of choir"—Construction—General charitable intention—Surplus to be applied cypres.

A legacy and a share of the residue was bequeathed "for the benefit of the choir."

Held, the gift is an impersonal gift for the advancement and improvement of the musical services of the church by means of a choir. There is a general charitable intention and the surplus funds must be applied *cypres*.

KING FEATURES SYNDICATE *v.* KLEEMAN, LTD., (1940) 1 Ch. 523.

Copyright—Drawing in two dimensions—Whether can be infringed by a toyfigure in three dimensions—Reproduction from a copy of plaintiff's work—Whether infringement of copyright in original work.

Where the artistic work in which copyright is claimed is a drawing in two dimensions (cartoons) it can be infringed by a figure in three dimensions such as (brooches or charms, plaster dolls and mechanical toys). It must be immaterial whether the infringing article is derived directly or indirectly from the original work. The standard is objective and the test is whether or not the original work or a substantial part thereof has been reproduced. If it has been, it is no answer to

say that it has been copied from a work which was itself, whether licensed or unlicensed, a copy of the original.

CLAYTON, *In re*: COLLINS *v.* CLAYTON AND READE, (1940) 1 Ch. 539.

Costs—Solicitor's lien—Charge limited to costs incurred in recovery of property.

Where solicitors had acted on behalf of the administrators of the estate (defendants in a summons for administration of the estate of an intestate) and in the course of the action some property was sold and proceeds were brought into Court, the solicitors asked for a charging order for all the costs of the action.

Held, the charging order should be limited to the costs properly incurred in recovering and preserving the money in Court.

TREBANOG WORKING MEN'S CLUB AND INSTITUTE, LTD. *v.* MACDONALD; (1940) 1 K.B. 576.

Clubs—Serving of intoxicating liquor to members—If sale of liquor—If requires justices licence.

In a prosecution of an incorporated member's club for selling intoxicating liquor without holding a licence,

Held, that the transaction which takes place in a member's club, when a member orders and pays for intoxicating liquor is not a sale but is rather deemed the transfer of a special property in the goods from all the other members of the club to the consumer in consideration of the price paid. The club does not require a justices licence to cover the serving of intoxicants to members.

REX *v.* CARMICHAEL, (1940) 1 K.B. 630.

Crimes—Indictment of father for incest—Evidence by father that subject of the charge was not his daughter though born in wedlock—Admissibility—Rule in Russell *v.* Russell, *if precludes such evidence.*

On 2nd September, 1912, the accused married *P* and there were two children of the marriage—*Elsie* born on 11th April, 1913 and *Sonia* born on 18th May, 1915. Throughout 1914 *P* lived at Cambridge and the accused in London. Accused used to visit the wife during week ends. There was evidence that about August, 1914, 9 months before the birth of *Sonia*, *P* was associating with a stranger *H* but there was no evidence of misconduct. In January, 1915, accused enlisted in the army and while he was away his wife committed adultery with *H* and on 17th November, 1916, accused presented a divorce petition and a decree for divorce was duly passed. On

10th July, 1918, accused married *G* and the daughters *Elsie* and *Sonia* lived with accused's mother till 1926 when they came to live with the accused and his second wife. In 1932 accused separated from *G* who became suspicious about accused's feelings towards *Sonia*. After that accused lived with *Sonia*, who since then gave birth to three children. In the divorce petition against his first wife and on other occasions the accused had acknowledged that he was the father of *Sonia*. The accused was charged with incest. The second wife *G* was cited as a prosecution witness. Accused wanted to ask her in cross-examination whether it was not the fact that the accused had informed her that he was not the father of *Sonia*. The Judge held *Russell* v. *Russell*, made the question inadmissible. Then accused in giving evidence for himself sought to prove that at the time of the offence charged he knew he was not the father of *Sonia* and that his first wife told him so. The evidence was disallowed on the ground that it would infringe the rule in *Russell* v. *Russell*, and the accused was convicted. On appeal,

Held, the ingredient of the offence is that accused should have had carnal knowledge with one " who is to his knowledge his...... daughter." Knowledge is vital to the commission of the offence. *Russell* v. *Russell* did not preclude the accused from giving any relevant evidence in support of his plea that he did not believe that *Sonia* was his daughter, including an admission or confession by her mother.

DIGBY *v.* GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., (1940) 1 K.B. 643.

Insurance—Motor insurance—Indemnity against third party risks of policyholder and similar indemnity to authorised driver—Claim of policyholder against his driver—Rights under policy—Arbitration clause—If binding on driver.

An Insurance Company undertook to indemnify the policyholder in respect of any claim by any person including passengers in the car against all risks through or in respect of his car. The indemnity was to extend to any person driving the car with the owner's order or permission. The owner having been injured in a collision and failing in his claim against the owner of the other car, sued his own chauffeur who in turn claimed indemnity under the policy of insurance. It was contended that the policyholder could not be a claimant.

Held, the driver was entitled to be indemnified in respect of damages awarded to the policyholder against him. The chauffeur was bound by the arbitration clause in the policy.

RUBIE *v.* FAULKNER, (1940) 1 K.B. 571.

Motor driving—Offences—Learner driving under supervision of competent driver—Driving on wrong side leading to collision—Competent driver remaining passive—If can be convicted of aiding and abetting offence.

A person with a learner's licence drove the motor car in a bend of the road on the offside and as a result of the engine stopping there was a collision. The appellant, a competent driver, accompanying the learner, in conformity with the Motor Vehicles Regulations remained passive, without warning the learner not to go to the offside of the white line on the road which the appellant occupying the back seat was able to see.

Held, the appellant by his passive conduct in circumstances in which something was needed to be done in order to fulfil the duties of a supervisor, aided and abetted the learner driver to commit the offence.

UNSWORTH *v.* ELDEN DEMPSTER LINES, LTD., (1940) 1 K.B. 658.

Workman's compensation—Receipt of compensation by workman—Circumstances precluding common law remedies.

On 8th March, 1938, plaintiff while working on a certain ship to load the vessel was injured by a beam which fell on him. He received half wages during disablement. He did not know his right to damages and right to compensation under the Act.

Held, the workman was not receiving the money with knowledge that it was compensation under the Act. He was not precluded from enforcing his common law remedies. (1939) 3 All.E.R. 339 reversed.

MCQUACKER *v.* GODDARD, (1940) 1 K.B. 687.

Tort—Animal causing injury—Liability of owners—Camel—Whether domestic or wild animal—Question whether animal wild or domestic—If for Judge or jury.

A camel in a Zoo having bit the plaintiff while visiting the Zoo, the owners were sued for damages. The evidence was overwhelming that in fact camels are the oldest domesticated animals in the world. There was no evidence that the defendant knew that this particular animal was likely to do mischief.

Held, the defendant is not liable. The question whether an animal is wild or domestic is for the Judge to decide and not for the jury. The Judge takes judicial notice of the ordinary course of nature—in this particular case of the ordinary course of nature in regard to the position of camels, among other animals. The evidence was given merely to assist the Judge in forming his view as to what the ordinary course of nature in this regard, in fact is, a matter of which he is supposed to have complete knowledge.

EVANS *v.* OAKDALE NAVIGATION COLLIERIES, LTD., (1940) 1 K.B. 702.

Workmen's compensation—Certification of silicosis—Workman receiving compensation on that day for previous accident—Extent of compensation for silicosis.

A collier met with an accident on 12-8-1935 while working for the appellant company. Several ribs were broken and he was paid compensation on the basis of total incapacity at the rate of 30*s.* per week, until 9-12-1936 and then reduced to 19*s.* per week. On 22-2-1937 the medical board certified the workman to be suffering from silicosis as a result of his employment and dated the disability back to 18-11-1936.

Held, the workman must notionally be regarded on 18th November 1936, as having then a full earning capacity which has been totally destroyed by the silicosis and the payment in respect of the first accident ought not to be taken into account.

SUNLEY (B) AND CO., LTD. *v.* CUNARD WHITE STAR, LTD., (1940) 1 K.B. 740.

Contract—Damages for breach—Failure of defendant to transport certain machine in due time—Machine idle for a week—Proper measure of damages.

The plaintiffs were contractors and the defendants undertook to transport one of plaintiff's "tractor and scraper" from one workspot to another. There was a delay of one week in carrying out the contract and plaintiff claimed damages. The evidence did not show that the work for which the machine was transported would have been finished earlier or that there was any loss of profits.

Held, plaintiffs were entitled to recover only nominal damages for depreciation, interest, maintenance of machine and wages. (1939) 3 All.E.R. 641, varied.

ONLO OSAKAYETIO *v.* ARNOLD LEVER AND CO., LTD., (1940) 1 K.B. 750.

Contract—C.I.F. contract for purchase of timber—Insurance—Increase of premium for covering war risks to be for buyer's accounts—Shipping cargo in belligerent ship—Buyer if liable for increase of premium.

In a C.I.F. contract for purchase of timber there was an insurance clause providing that any increase in premium payable for covering war risks (according to institute war and strike clauses in force at the time of attachment of the insurance) in excess of prevailing rates to be for buyer's accounts. The shippers chartered a Spanish (then belligerent state's) ship covering the cargos with insurance at a

rate in the discretion of the underwriters. In a claim against buyers for the excess in the premium rate,

Held, the claim failed. There was no ruling rate for Spanish ships and buyers were liable only for scheduled rates of premium: (1939) 4 All.E.R. 88, affirmed.

IMPERIAL SMELTING CORPORATION, LTD. *v.* JOSEPH CONSTANTINE STEAMSHIP LINE, LTD., (1940) 1 K.B. 812.

Contract—Charterparty—Frustration by accident to ship—Onus of proving that frustration was or was not self-induced.

The claimants (the charterers) claimed damages for failure to load. The respondents (shipowners) pleaded the destruction of the ship as a navigable unit (by reason of the bursting of a boiler) and claimed that the contract was thereby frustrated, without liability on their part. The claimants in reply stated that the frustration arose from the default of the respondents, who are not entitled, therefore, to rely upon it.

Held, as a general rule a party seeking to recover compensation for damage must prove that the party against whom he complains was in the wrong. When respondents have proved the accident causing the destruction of the ship, the onus of ultimately satisfying the tribunal that the ship was at fault rests on the claimants. Whether such onus has been discharged must be judged by applying the following principles—namely (*i*) if the accident was such as to raise a presumption of negligence the onus is on the owner to destroy that presumption; (*ii*) if the accident was such as to afford no proof of negligence the onus is on the charterers to prove negligence in fact; and (*iii*) if the onus is upon the owner under the first principle, that onus is discharged by proving facts from which the inference that the accident was not caused by negligence is as strong—that is, equally consistent with the facts—as is the inference that it was caused by negligence. (On the facts the claimants failed to discharge the onus and the claim was dismissed.)

ETTENFIELD *v.* ETTENFIELD, (1940) P. 96.

Husband and wife—Separation deed—Birth of child—Evidence of spouses as to non-access—Admissibility.

It was found that the husband left his wife about August 6, 1935. Parties orally agreed to live apart, the husband making a weekly payment to his wife. The wife gave birth to a child on May 26, 1937. The question arose whether the husband could give evidence of non-access.

Held, (1) The rule in *Russell* v. *Russell* that evidence tending to bastardise or legitimise a child conceived and born during wedlock

cannot be given by either spouse is absolute, and applies, not only when the parties are living together, but also when they are separated either by a decree of a Court of competent jurisdiction or by their own volition. (2) Where the only evidence of adultery in support of a husband's petition is the birth of a child to the wife (*a*) if the parties have been separated by the decree or order of a Court, the husband need prove no more than the date of the decree or order and the date of birth of the child. If it must have been conceived after the date of the decree or order, there is a *presumptio juris* that it is a bastard. The wife may rebut that presumption if she can, but she must do it by evidence other than her own; (*b*) where the parties have voluntarily separated, whether by deed, writing under hand, oral agreement, or agreement implied from conduct, the husband cannot give evidence of non-access, but he can prove that fact by any means open to him other than his own evidence. The presumption is that the child is legitimate. If the husband leads evidence to rebut that presumption, the wife can call, but cannot herself give evidence in support of the child's legitimacy. Case-law discussed. Decision of *Langton, J.*, in (1929) 2 All.E.R. 743, reversed. Leave to appeal to House of Lords given.

JOTTINGS AND CUTTINGS.

Mr. R. Satyamurthi Aiyar.—Mr. R. Satyamurthi Aiyar, Master of our High Court, has been selected by the Central Government to serve as a Judicial Member of the Appellate Tribunal, Income-tax, constituted under S. 5-A of the Indian Income-Tax Act, 1922. Mr. Satyamurthi Aiyar has been a member of the Provincial Judicial service since 1919. Starting as a District Munsiff, he became Assistant Registrar, High Court, in 1926 and thereafter has held in succession the posts of Official Referee, Deputy Registrar and Master. He also acted as Registrar for a short spell during this year. He is the author of a number of books:—The Court-Fees Act, The Civil Procedure Code, etc. It may be remembered that some time back the Government of Madras entrusted him with the task of bringing to light the loopholes as well as the difficulties experienced in the working of the Court-Fees Act, with a view to the framing of suitable amendments thereto. The Appellate Tribunal, Income-tax is vested with important functions, being as it were a sort of second appellate authority in income-tax matters. We wish Mr. Satyamurthi Aiyar a career of usefulness and success in his new sphere of service.

Vagaries of Draftsmanship.—If anywhere absolute precision of language is eminently essential it surely is in the sphere of legislative

enactments. In these, however, as in other products of the human mind, the desiderated precision is sometimes conspicuous by its absence, with the consequence, not altogether displeasing to members of the legal profession, of providing ample room and verge enough for debate in the Courts as to the purview of the statutes, so lacking, which come up for consideration. The late Lord Thring, who for many years held the important office of Parliamentary Counsel, compiled an admirable work treating of this subject, and incidentally gave various examples of how not to achieve the desired clarity; in short, a number of what nowadays are called, although why is not very obvious, "howlers." Among these which he cites is that of the Queen's Counsel, also a member of the House of Commons, who in 1865 drafted an amendment to a Bill then before the House, which ran thus: "Every dog found trespassing on inclosed land unaccompanied by the registered owner of such dog or other person who shall on being asked give his true name and address, may be then and there destroyed by such occupier or by his orders." This piece of draftsmanship, oddly enough, was not accepted by the sponsors of the Bill or by the House!—*L. T.*, *1940*, *p. 148*.

Some Amusing Slips.—A story has come down to us from the days when Ireland was represented in the House of Commons and when that country sent not a few who enlivened the oftentimes dull proceedings by some exceedingly witty interjection, or occasionally by what Calverley called in the delightful way a "paronomasia, play upo' words," or, in simple language, a bull. On one occasion an Irish member drafted a Bill wherein it was provided that such and such proceedings should take place annually on 1st August, "unless that day fell upon a Sunday, Good Friday, or Christmas Day." It need hardly be said that the Bill, at any rate in this form, did not get into the statute book. But one quite as bad, or nearly so, was perpetrated by the draftsman of the Bill which eventually reached the statute book as the Darlington Improvement Act, 1872, in which the term "new building" was defined thus: "Any building pulled or burnt down to or within 10 feet from the surface of the adjoining ground." But slips are also to be found not infrequently in our older Acts; thus in the Registration Act, 52, Geo. 3, c. 146, the fruit of penalties is to be divided between the informer, who gets one-half, and certain charitable purposes, to which the other is devoted, while the only penalty set forth is transportation for fourteen years!—*L. T.*, *1940*, *p. 148*.

Criminal Statistics.—The Criminal Statistics for England and Wales for 1938, which were recently issued by the Home Office, show

that the total number of persons found guilty of indictable offences during the year was 78,463. There were 84 cases of murder of persons over one year of age known to the police (compared with 78 for the previous year); and in 30 cases the murderer or suspect committed suicide. Nine persons were hanged, in nine cases sentence of death was commuted to penal servitude for life, and in one case the convicted person was ordered to be detained during His Majesty's pleasure. During 1938, 5,263 persons committed suicide and 3,303 cases of attempted suicide were reported to the police. The number of persons found guilty of violence against the person (indictable cases) was 1,583 or 0.2 per cent. of the total number of offences recorded. Non-indictable assaults numbered 10,699 or 1.4 per cent. As to larceny, there were 78,463 offenders, of whom 68,679 were males and 9,784 females. Of those found guilty of larceny, 10,814 or 13.7 per cent., were charged with breaking and entering. Less than a quarter of these were adults and 37 per cent. were under the age of fourteen. It appears that in general the worst age groups for boy offenders is from fourteen to sixteen, and for girl offenders from fifteen to nineteen. The incidence of crime is nearly eight times greater among males than among females. The total number of persons found guilty of drunkenness in 1938 was 52,661, or 236 more than in 1937. The increase in this class of offence which has been recorded since 1932, when the figure was 33,100, thus continuous. Once again wide local variations throughout the country are recorded in the proportion of adult offenders placed by courts of summary jurisdiction under the supervision of a probation officer. An analysis of records of the Criminal Record Office at Scotland Yard of persons found guilty of criminal offences in 1932 discloses the fact that the great majority do not offend again. Of the older persons 90 per cent., of the younger over 70 per cent., were clear of any further charges during the ensuing period of five years; while these statistics show that the proportion of offenders convicted of further offences is higher among the young than the older people and decreases progressively with the increase of age. In all age groups the re-conviction rate was lower for the period from 1933 to 1938 than for the previous five years.—*S.J., 1940, p. 157.*

Enthusiasm in the Law.—Long ago Lord Bacon laid it down that every man is a debtor to his profession, meaning thereby, we may assume, that in the legal sphere the lawyer is under obligation to give of his best on behalf of the client by whom he is instructed—an injunction which most members of the profession fulfil to the letter. In one of the letters in Scott's Redgauntlet, Alan Fairford, writing to his friend Darsie Latimer, says, "You know my father considers every moment taken from the law as a step downhill; and I owe

much to his anxiety on my account, although its effects are sometimes troublesome," and one can well imagine that Scott was stating his own experience, his father being one of the old school who thought law was everything and must on no account be neglected if his son was to make any headway in the legal world. Some, no doubt, exhibit an enthusiasm in the practice of the law which puts the less excitable practitioners to shame. Most of us are familiar with the story, certainly ben trovato if not literally accurate, of Baron Parke, who in his enthusiasm took what he called "a beautiful demurrer", to the beside of a sick friend to cheer him into convalescence—a result which it is to be hoped had the desired effect. In other ways, too, the Baron showed his enthusiasm for legal correctitude by insisting that the record should be above suspicion in the matter of form, nothing giving him more pain than to find it lacking in precision and clarity; these he regarded as essential. Great lawyer he certainly was, but he had at least one predecessor on the Bench who was equally enthusiastic for law and its practice. This was Mr. Justice Buller of whom, in another connection, it was said that, while he was considered by the male sex as the most learned of lawyers he was stigmatised by the ladies as the most cruel of judges because to him was attributed the ungentlemanly dictum that a husband was entitled to beat his wife, provided that the stick with which the castigation was administered was no thicker than his thumb! Like many other pungent remark attributed to men in a prominent position the accuracy of this dictum has been gravely doubted, and surely he is entitled to the benefit of the doubt. More germane to our present purpose was his dictum that his idea of heaven "was to sit at Nisi Prius all day, and to play at whist all night"!—*L.T.*, *1940*, *p. 210*.

No Certain Bliss.—"Was your marriage happy at the start?" Counsel recently asked a witness in the Divorce Court, and Mr. Justice Bucknill said: "We cannot assume that marriage is a state to which the word "happy" can properly be applied. It is enough if a spouse can say of it that it was even normal. 'Was your marriage normal?' is a much more sensible question." Constant dealing with matrimonial causes seems to make judges chary of talking too lightly of happiness. One recalls the case of an eloquent advocate who wound up a speech before Mr. Justice Cresswell with the words: "I hope your lordship will decree a separation between these parties and let this lady pass the rest of her days in peace and happiness." But the judge said: "This Court has no power to decree that the lady shall pass the rest of her days in peace and happiness, but what it has power to decree is that these persons shall be judicially separated." On the whole, both in marriage and separation, it is

probably wise to leave out "lived happily ever after." *S.J.*, *1940*, *p. 181*.

Judges' Mannerisms.—Of late the glamour value of Bench and Bar has caused more traders than usual to drag them into advertisements for the stimulation of sales. One of these, designed to sell a species of chocolate bean, said to be good for the nerves, told (with comic illustrations) the story of a barrister who was put off his speech by an eminent judge's habit of tapping absent-mindedly on his desk, but who cured his lordship with a timely gift of a packet of the wonderful beans. Well, that, at any rate, was a better way of dealing with the situation than the one adopted by an Irish Barrister who, irritated by the mannerisms of Crampton, J., interrupted his argument before the full Court, saying: "I really can't proceed while Judge Crampton is nodding his head at me and the smack of his lips every five minutes is like the uncorking of a bottle." The old judge, who was a most polished gentleman, did not fly into a rage at this rudeness, but said: "I am really not aware of these peculiarities and I am grateful for the rebuke. No man is conscious of his own peculiarities."—*S.J.*, *1940*, *p. 181*.

Dr. Johnson on Law and Lawyers.—To praise Boswell's Life of Johnson is in these days a work of supererogation; it is a classic in the domain of biography, but like many another classic it is apt to be taken as read and to be left on the shelf along with many another volume which has achieved distinction in the world of literature.

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It is certainly a very pleasant occupation for a leisure hour to turn to some of the many references to the legal world and its work as viewed by the virile mind of Johnson. In 1768, Boswell, who loved to draw his mentor out on questions of casuistry, asked Johnson whether as a moralist he did not think that the practice of the law did not in some degree hurt the nice feeling of honesty. To this, it will be remembered, the doctor replied that he did not think so, provided that one acted properly, meaning, thereby, that the lawyer must not deceive his clients with false representations and must not "tell lies to a judge." The pertinacious Boswell, not content with this, continued his cross-examination by the question, "But what do you think of supporting a cause which you know to be bad?" "Sir," answered Johnson, you do not know it to be good or bad till the judge determines it......You are not to be confident in your own opinion that a cause is bad, but to say all that you can for your client, and then hear the judge's opinion." Even this failed to satisfy the curiosity—for it was only this—of Boswell, who, we may be sure, cared not a jot whether the case he chanced to be supporting

in court was really good or bad. But it is worth being reminded of Johnson's practical view of the moral aspect of the question which "Bozzy" affected to be so much worried about.—*L. T., 1940, p. 239.*

What's in a Trade?—Those witnesses who attach so much importance to the elegant description of their callings would do well to remember the story of a particularly self-confident young barrister who began rather badly with the examination of his first witness in his first case. "You are a butchah, arn't you?" he began. "No, sir," came the sullen reply. "Then you are a bakah, arn't you?" "No sir." There was a titter in court, but the young man rose magnificently above it. "Really", he said, "it doesn't matter a damn what you are!" Still, sometimes the question of occupation can be made to tell. In the course of the great Baccarat Case, Sir Charles Gill rose to cross-examine a fashionably dressed "swell" who stood in the box flourishing a tasselled cane. "Put that stick down and attend to me," he began. "What are you?" "What am I?" repeated the witness, taken aback "Yes, what are you?" said Gill in his nastiest tone. "What do you do for a living? What good are you to the world?" After that the witness could only murmur very pitifully: "I'm a master of foxhounds."—*S.J., 1940, p. 269.*

Outstanding Judges.—In each generation there is usually at least one member of the Bench possessing a personality which finds expression in some notable dicta, not always, it may be, strictly germane to the matter being forensically debated, and not even on purely legal topics which excite the attention of those who follow the proceedings of the Courts, but dicta, it may be, of a humorous character, or sometimes in the form of a scathing comment on men and things. In recent years the most conspicuous instance of a judge having such characteristics was, of course, Mr. Justice Darling, whose good things, if perhaps scattered with a too profuse hand, were usually of excellent quality giving great delight to those in his court, unless it may be those who were victims of his criticisms, and to them these could scarcely make a potent appeal. In an old notebook upon which the present writer lighted the other day he found preserved one or two of Mr. Justice Darling's dicta which seemed to be too good to lose, several of which may be of interest to readers. The earliest of these scattered memoranda takes us back to the days before that learned judge had reached the Bench, and recalls an early effort by Mr. Darling, as he then was, in an action which was tried by Baron Huddlestone. Darling was for the plaintiff, his opponent being A. G. C. Liddell, who later filled the office of ecclesiastical secretary under the Lord Chancellor, and who left us a singularly attractive

volume of reminiscences bearing the modest title "Notes from the Life of an Ordinary Mortal," which is full of good things. There he told us that, when still practising at the Bar, he appeared for the defendant in an action which was tried by Baron Huddlestone, the plaintiff being represented by Mr. Darling. The defendant was a blackman and a Parsee, and when he went into the witness-box to give evidence some discussion took place as to how he should be sworn. Eventually it was settled that he should unbutton his waistcoat and take the oath with his hand thrust inside a coloured thread which encircled his waist. Observing this quaint ceremony with no little interest, Mr. Darling quietly remarked, "The thread of the Parcae," thus giving promise of his future distinction as a master of shrewd and witty comment. Then there was his explanation that the maxim *Ne sutor ultra crepidam* has no application to anyone exercising judicial functions; it applies only to "suitors." Many will also remember his remark when it was sought to justify the cross-examination of a prisoner as to character on the ground that he had called the prosecutor a liar. Mr. Justice Darling thought that the proposed cross-examination was surely inadmissible seeing that the prisoner, under the stress of cross-examination, merely said of one man what the Psalmist said of all men!—*L.T.*, *1940, p. 287.*

BOOK REVIEWS.

THE CODE OF CIVIL PROCEDURE by Messrs. V. V. Chitaley, B.A., LL.B., Nagpur and K. N. Annaji Rao, B.A., B.L., Advocate, Madras, Volume III (3rd Edition). Published by The All India Reporter, Ltd., Nagpur. Price Rs. 36 per set.

This is the third and last volume of the third edition of the commentaries to the Civil Procedure Code by V. V. Chitaley and K. N. Annaji Rao and D. V. Chitaley. This work has taken a leading place among the books of reference on the Civil Procedure Code, the other commentaries having gone out of date without any recent editions being brought out. Its leading place is also due to the fact that it gives all the learning in the other works as well. Effort has been taken not to omit the reference to any case whether important or otherwise. The only matter for regret is that of the cases reported in the non-official journals, references are given to the All India Reporter alone even as regards the years prior to its publication thus causing inconvenience to those who have only the non-official journals published in such years. The scheme of the work is well known and has been followed in the authors' commentaries on the Criminal Procedure Code and the Indian Limitation Act. In common with these works, there is no index of cases referred to in

the body of the work. The volume under review deals with the first schedule of the Civil Procedure Code after Order 30 and the later schedules and the appendices. This edition fully maintains the level of its predecessors and will be used widely by the members of the Bench and the Bar.

THE LAW OF PARTNERSHIP IN BRITISH INDIA by S. T. Desai, B.A., LL.B., Barrister-at-law, 514 pages. Published by the author at Hughes Road, Bombay. Price Rs. 8.

It is with great pleasure that we welcome the publication of this treatise on the Law of Partnership. With the progressive industrial growth of India fresh and novel problems bearing on the rights and liabilities of partners *inter se* and towards the outside world are bound to occur increasingly. A book dealing exhaustively and in a dependable manner with the substantive as well as the procedural law on the subject had been a longfelt want and the present publication goes a considerable way in meeting that requirement.

The Book is laid in four parts. Part I deals with the Indian Partnership Act, 1932 and provides an adequate commentary on the various sections. Part II is devoted to Practice and Procedure with special reference to the various questions that arise in suits by, against, or between partners. Part III sets out the law of insolvency affecting partners and partnerships and Part IV contains a discussion of illegal partnerships. The English Partnership Act, 1890 and the superseded provisions of the Indian Contract Act regarding partnerships are set out in Appendices. An inclusion of the rules framed by the various Provincial Governments would have added to the utility of the work and made it complete in all respects.

On some matters it may be possible to take a different view from that presented by the author. For instance on page 37 the author has expressed the opinion that there can be a joint family business among converts from Hinduism to Christianity to which the Hindu joint family law can apply and reliance is placed on *Ghosal* v. *Ghosal*, 31 Bom. 26, in preference to *Tellis* v. *Saldanha*, 10 Mad. 69. It is doubtful whether the Bombay view could now be followed in view of the decision of the Privy Council in *Kamawati* v. *Digbijai*, 43 All. 525. Again, in stating the effect of non-registration of firms the author has remarked on p. 280 that S. 69 (2) "absolutely debars a Court from entertaining a suit instituted without compliance with the provisions relating to registration." It is certainly arguable whether the section postulates a total lack of jurisdiction in Courts or merely makes the exercise of jurisdiction contingent, so as to permit of a waiver or the curing of the irregularity arising from non-compliance with its provisions.

On the whole the book contains an accurate statement of the principles of partnership law in a lucid and attractive form. The get up and printing are excellent. We can heartily commend the book as a very useful contribution to the literature on the subject.

THE LAW OF EASEMENTS, by B. K. Amin, B.A., B.SC., Barrister-at-law and C. G. Sastri, B.SC., LL.B., 544 pages. Published by Messrs. N. M. Tripathi & Co., Bombay. Price Rs. 8.

This is a handy volume in which the authors have endeavoured to expound the law relating to easements in India. The statement of law takes the form of commentaries to the sections of the Indian Easements Act. In addition to easements allied topics like Party Walls, Fisheries, Ferries, Irrigation Rights, Public Rights, etc., have also been dealt with. The citation of cases, English and Indian, is both adequate and satisfactory. Critical examination of such points, as for instance, the capacity of a trespasser in occupation to acquire an easement right under S. 12, the meaning of the expression "as of right" in S. 15, the applicability in this country of the principles in *Colls' case* in relation to easements of light, etc., has not been avoided.

The discussion relating to the Madras Irrigation Cess Act and the legal consequences of cultivation with the help of water accidentally overflowing from a Government source, as found on pp. 343-344 of the book in particular, will have to be entirely recast in view of the Madras Irrigation Cess (Amendment) Act, 1940 (Madras Act VI of 1940). The latter enactment has been in force since April last but seems to have escaped the attention of the learned authors.

The differences between the English and Indian Law—wherever they exist—have been carefully brought out. The treatment of the subject is throughout lucid and we are sure that the book will prove highly useful to students and lawyers alike.

LAW OF ADVERSE POSSESSION by M. Krishnaswami, M.A., LL.M., Advocate, Dharwar, Professor, Law College, Poona. Published by M. Krishnaswami, M.A., LL.M. at his residence, Gibb Town, Dharwar.

Adverse Possession is a subject very familiar to the lawyer in India, as very often it is raised as a plea for perfecting the title of wrongful possession of a piece of property. No doubt the law on the subject has been evolved mainly due to the numerous decisions of the various High Courts and the Judicial Committee of the Privy Council.

The background for a proper perspective of the theme has been prepared for us in the first four chapters by the author of this useful volume when he dilates upon the theoretical aspect of the subject, referring to its early concept in Roman Law as well as British Jurisprudence. The next few chapters deal with the nature of adverse possession and the variety of instances where it is recognized as such. Abundant case-law references are throughout furnished to the reader and the attempt to reconcile the conflicting decisions upon the subject in the various Courts is really commendable.

We cannot however conclude without a little disagreement with the author in his deliberate intention to omit a general index to this volume, because, we believe, the usefulness of a general index can never be overrated in any law book, apart from a special index of cases required to aid an easy reference.

THE INDIAN COMPANIES ACT by Menezes and Shah. Published by Messrs. Vora & Co., Ltd., 3, Round Building, Kalbadevi Road, Bombay, 1940 Edn.

The recent amendment of 1936 to the Indian Companies Act has introduced nearly a hundred new sections in addition to the repealing of certain old provisions. The complex nature of modern enterprises in commercial, industrial and banking concerns necessitated the substantial change in the Act to meet the growing demand for fresh legislation pertaining to the management of Joint Stock Companies as well as their amalgamation and winding up. We have further a few sections in the Act devoted to companies outside India and those mainly carrying on a banking business. We cannot but agree with the authors in their opinion in the preface that instead of a separate chapter in the Companies Act, a separate Act for reforming Indian Banking just on the same lines as the recent Insurance Act would have served the interests of this country better.

The scheme of this book discloses no doubt a meticulous care in commenting and criticising the Act with timely references to both English and Indian authorities. Apart from its usefulness to the practising lawyer, the book bids fair to be of great help to the business world in general. The table of contents and the index of cases add to the usefulness of an otherwise handy volume upon Company Law.

THE LAW OF FATAL ACCIDENTS IN INDIA by M. M. Aslam Khan. Published by the Sufi Publishing House, Pindi Bahauddin, Punjab. Price 2-8-0.

This small treatise upon the law relating to fatal accidents evokes our appreciation, even at the outset, for the author's selection

of such an untraversed, though quite an important, piece of legislation on the Statute Book. Had the law remained in the form in which it was before the Act of 1855 was brought into force, no person's relatives, surviving him after his death due to the fatal accident arising from any of the causes mentioned in section I of the Act, could maintain an action against the persons responsible for the fatal injuries. But the Act of 1855 brought about a salutary change in the existing law in that an exception to the rule '*actio personalis moritur cum persona*' made it easy to the executor and administrator of a deceased person to sue the person who was responsible for the fatal accident. The later amendments of 1871 and 1914 to the Act improved the scope of the Act and met the need as then was felt for fresh legislation.

The Act itself is a very brief one of about four sections and the author deserves the thanks of the legal profession for having made a good research of the Case-law upon the subject, both English and Indian, and bringing it up to date.

This commentary is a very necessary, though a long neglected, attempt, and is rendered more so owing to the number of fatal accidents that has been on the increase with the growing volume of road traffic in our cities. The discussion of the amount of damages recoverable under particular circumstances is what makes this little volume of 55 pages compel the immediate notice of the legal profession.

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A CRITICAL NOTE ON JANAK DULARI *V.* SRI GOPAL, I.L.R. 1939 ALL. 912.

The validity of the Hindu Women's Rights to Property Act, 1937 (Act XVIII of 1937) was affirmed by the Allahabad High Court in *Janak Dulari* v. *Sri Gopal*[1]. In that case a widow claimed that she was entitled to certain properties of which her husband had died possessed, either as his heir or by virtue of the provisions of Act XVIII of 1937 if it transpired that he had died undivided. The main defences were that the family was joint and that Act XVIII of 1937 was not validly passed.

A noteworthy fact concerning the Act is that though as a Bill it had been passed by both the Houses of the Indian Legislature while the Government of India Act, 1915, as amended in 1919 was in operation, yet the Governor-General's assent to the measure was given only on the 14th of April 1937, after the coming into force of the Government of India Act, 1935, excepting for Part II thereof.

The Government of India Act, 1935, repealed practically in its entirety the earlier Government of India Act[2]. The effect of the repeal was to bring about a resumption into the hands of the Crown of all rights, authority, and jurisdiction in whomsoever they had been vested at that time and their redistribution in the manner prescribed by the repealing Act[3]. As observed by Lord Tenterden, C.J., in *Surtees* v. *Ellison*[4],

> "it has long been established, that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed."

Consequently all appointments made, institutions created and laws framed under the earlier Government of India Act would cease

1. I.L.R. 1939 All. 912.
2. S. 321 and Sch. X.
3. *See* S. 2.
4. 9 B. & C. 750: 109 E.R. 278; *see also Attorney General* v. *Lamplough*, 38 L.T. Rep. 87.

to have effect unless saved by express provisions in the repealing Act. S. 321 (2) provides that the repeal shall not affect any appointment made under the repealed Act to any office and any such appointment shall have effect as if it was an appointment to the corresponding office under the repealing Act. It was by virtue of this provision, that the validity of the election to the office of Speaker of the Bengal Legislative Assembly, which was challenged on the ground that the Governor of Bengal who had directed such election and subsequently accorded his assent to the choice made had not been validly re-appointed as Governor of the Province after the commencement of Part III of the Act of 1935 in the manner provided by that Act, was affirmed in *Tulsi Charan Goswami* v. *Azizul Huq*[1]. Similarly S. 223 saves the jurisdiction of the High-Courts as well as the powers of the judges thereof in relation to the administration of justice including their rule making powers, and the section was held to preserve all the powers which the High Courts in fact had prior to the Act of 1935[2]. Likewise, S. 276 provides for the continuance in force of the rules relating to the services under the Crown framed under the repealed Act until other provision is made under the new Act, as if they were rules framed under the latter Act[3]. The scheme of the Act is clear, namely, that wherever existing appointments or institutions or rules are intended to be continued express savings are to be provided prescribing that they all are to be regarded as having been done under the appropriate provisions of the Act of 1935.

It is a general principle that when a parent Act is repealed, all the laws passed under that Act also stand repealed unless there is an express saving provision in the repealing enactment[4]. S. 292 of the Government of India Act, 1935, provides for the continuance of all the laws in force in British India prior to the commencement of Part III of the Act, *i.e.*, before the 1st April 1937[5], though the validity of such laws is not in any way guaranteed[6]. Laws made before the commencement of Part III but intended to take effect only after that date were to have validity for twelve months from that date despite the repeal of the 1919 Act and notwithstanding S. 292 of

1. I.L.R. (1937) 2 Cal. 509.
2. *Mulji Sicka & Co.*, v. *Municipal Commissioner of Bombay*, A.I.R. 1939 Bom. 471 : 41 Bom.L.R. 984.
3. *See also* S. 15 (2) of the Government of India (Commencement and Transitory Provisions) Order, 1936.
4. *Atiqa Begam* v. *Abdul Maghni*, A.I.R. 1940 All. 272, 280 (F.B.) ; *Watson* v. *Winch*, (1916) 1 K.B. 688 : 114 L.T. 1209. *See also* Halsbury (Hailsham edition) vol. 26, p. 608, para 1291.
5. *See* Art. 3 of the Government of India (Commencement and Transitory Provisions) Order, 1936.
6. *See* S. 176.

the Act of 1935.[1] This provision was in effect superseded by S. 1 of the India and Burma (Existing Laws) Act, 1937, which laid down that for the purposes of S. 292 a law passed or made before the commencement of Part III of the Act of 1935 shall be declared to be a law in force immediately before that date, notwithstanding that it, or parts of it, may not then be in operation, either at all or in particular areas.

The Hindu Women's Rights to Property Act, 1937 (Act XVIII of 1937) was certainly not a law in force prior to the commencement of Part III of the Government of India Act, 1935. Being an Act of which the commencement was not specifically enacted it became law only from the date when the Governor-General signified his assent, *i.e.*, from 14th April 1937[2]. Further it is the assent of the Governor-General that gives a Bill " the complement and perfection of a law "; and thus the Hindu Women's Rights to Property Act had no place in the Statute Book of the country till after the commencement of Part III of the Government of India Act, 1935. Neither S. 292 of the Act of 1935 nor S. 1 of the India and Burma (Existing Laws) Act, 1937, can therefore apply. Nor can the Hindu Women's Rights to Property Act be regarded as a law passed subsequent to 1st April 1937, for the Bill had emerged from both Houses of the Legislature prior to that date. When the Government of India Act, 1919, was repealed the Indian Legislature functioning under that Act would stand dissolved *ipso facto* there being no express provision in the Act of 1935 continuing its existence in its identical form. With such dissolution of the Legislature all Bills pending the assent of the Governor-General would automatically lapse[3]. Since the assent of the Governor-General to the Hindu Women's Rights to Property Act was not accorded prior to the 1st of April 1937 it looks as if there was in law no Bill to which such assent could be given on a later date. The positive provision in S. 30 (5) of the Act of 1935 that it is only a Bill pending in the Federal Assembly or having been passed by the House is pending in the Council of State that will lapse on a dissolution of the Assembly no doubt constitutes a departure from the English practice but can be of no avail in the present case for it is the old practice that will operate till Part II of the Act of 1935 is brought into force. Rule 36-C of the Indian Legislative Rules made under S. 67 read with S. 129-A of the earlier Act, provides that on the dissolution of either Chamber all Bills which have not been passed by the Indian

1. S. 9 (1) of the Government of India (Commencement and Transitory Provisions) Order, 1936.

2. *See* S. 5 of the General Clauses Act (Act X of 1897).

3. May, Parliamentary Practice (13th edition), p. 56. *Cf.* Halsbury (Hailsham edition), vol. 24, p. 268, para 517.

Legislature shall lapse. The expression "Indian Legislature" is explained in S. 63 as consisting of the Governor-General and the two Chambers. It is also stated that ordinarily a Bill is not to be deemed to have been passed by the Indian Legislature unless it has been agreed to by both the Chambers. This cannot however mean that a Bill so agreed to will be a Bill passed by the Indian Legislature, for, the Governor-General is a part of the Legislature and under S. 67 (4) he can remit the Bill for reconsideration or may altogether refuse to assent. So long as assent has not been given a Bill will not be one passed by the Legislature and as such will not be saved from lapse by Rule 36-C, on dissolution of either House. It is true that by virtue of the provisions of Ss. 316 and 317 of that Act the former Indian Legislature is to exercise the functions of the Federal Legislature during the transitory period. This however cannot imply that the Indian Legislature functioning under Part XIII of the Act of 1935 is the same juristic body as that which functioned under the Act of 1919. On the commencement of Part III of the Act of 1935 the members of the Council of State and the Legislative Assembly who had been elected or nominated to represent Burma or Burma constituencies dropped out.[1] Again, the Indian Legislature after that date can exercise its powers freely only as regards the items constituting the Federal List and in a restricted degree over the subjects specified in the Concurrent List and not at all in the case of the items forming the Provincial List, whereas formerly its powers were far wider in range and operation. Do not these facts suggest that on the coming into operation of the Government of India Act, 1935, there has been a notional dissolution in any event in the first instance of the Indian Legislature that functioned under the Act of 1919 and a subsequent resurrection of it with reduced powers and altered composition by virtue of Part XIII of the Act of 1935? If there was then a dissolution, even if it be only notionally, will not the Bills pending the assent of the Governor-General at that time lapse? Nor is there any provision in Part XIII of the Act of 1935 empowering the Governor-General to assent to Bills of that type. No doubt S. 68 of the repealed Act empowering the Governor-General to assent to a Bill passed by both chambers of the legislature is kept in force during the transitory period; but this can govern only in the case of a Bill passed by the Chambers after 1st April, 1937, *i.e.*, at a time when the Houses functioned with reduced strength and powers. There is nothing in the Act of 1935, to suggest that it ever contemplated or provided for assent being given to a measure of the type of the Hindu Women's Rights to Property Bill. In the present decision the Allahabad High Court has cryptically stated:

1. S. 8 of the Government of India (Commencement and Transitory Provisions) Order, 1936.

"It appears to us that the provisions made in S. 317 and Sch. IX are intended to continue the validity of the functions of the Indian Legislature."

Evidently their Lordships are of the opinion that there is no break in the continuity of the Legislature despite the repeal of the Act of 1919. It is one thing to make provision for the Indian Legislature assuming the functions of the Federal Legislature but it will be an altogether different thing to read those provisions as maintaining intact the Indian Legislature and preserving its juristic identity and continuity despite the repeal of the Act which had given birth to that Legislature. In the circumstances therefore a fuller consideration of the question is certainly to be desired.

MADRAS PAWNBROKERS BILL

The Madras Pawnbrokers Bill has met with considerable opposition from pawnbrokers in the City and in the Mofussil. While it must be admitted that the Bill requires modification in several respects the measure itself is a very desirable piece of legislation. The Bill is largely modelled on the corresponding English Act 35 and 36 Vict., c. 93 and its language is clear and concise. It is significant that the protest against the measure has practically been directed to the points on which the framers of the Bill have departed from the English Act.

LICENCES.—Thus in respect of the grant of licences the power is vested in England with the Magistrates or with the Justices of the Petty Sessional Division, while under the Madras Bill the power is vested with the Police Officers specified in S. 4 (1). The combination of the licensing and prosecuting powers in the Police is open to serious objection. The issue of a licence is no doubt made obligatory except in the two circumstances mentioned in S. 4 (2); but even then, it should not lie within the power of the Police to decide if the applicant has adduced 'satisfactory evidence of good character.' It would be well if the licensing authority were vested in Magistrates, and it is further necessary that there should be a right of appeal to a higher authority when the licence is refused.

ARREST BY POLICE.—The other provision which should be jettisoned from the Bill is S. 18, which provides that "any Police Officer may arrest without a warrant any person committing in his view an offence." Neither grounds of public policy nor the ends of justice would seem to require this extraordinary extension of the power of the Police to arrest without warrant, and our experience of the exercise of such powers even in cases now allowed by the law does not encourage any extension thereof. If the offence disclosed is a major offence such as theft, forgery or breach of trust the general Penal Law can be availed of; and in respect of the other offences committed under the Act there is no need for undue severity in the

matter of cognisance. The criticism that the section as it stands vests an unduly large power of surveillance in the Police is largely justified.

PAWN TICKET.—The provisions of the Bill as to the issue of a pawn ticket, and the legal incidents of the ticket have been taken word for word from the English Act and are in the main salutary; but it is doubtful if the average pawner in this country can be trusted to appreciate the value of the document in the same manner as in England where conditions of literacy and business are quite different. The provision in S. 8 (2) that the pawnbroker shall not be bound to deliver back a pledge unless the pawn ticket is delivered may work hardship in the majority of cases where the ticket is lost or mislaid, and any amount of conflict might arise between the possible holder of the ticket and the person making a declaration of "pawn ticket lost." And cases again may easily be imagined where the ticket given by the pawnee with his right hand is taken back by his left hand. The better arrangement would seem to be to have the pawn tickets issued in duplicate, and allow the duplicate copy containing the signature of the pawner to remain with the pawnee. And the pawner might be enabled to redeem the pledge after acknowledging the same in the duplicate so left. It is worth remembering that in England in the case of special contracts of pawn the pawn ticket is so made in duplicate.

PUNISHMENTS.—With reference to the punishments prescribed, S. 14 makes certain acts of the pawnbroker punishable, while S. 15 makes certain acts of the pawner punishable. They correspond word for word to Ss. 32 and 34 of the English Act; but while the English Act awards a sentence of fine only in such cases, the Madras Bill renders the offences punishable with *imprisonment or fine*. The proposed legislation being protective in its nature it would be better to adopt the standard of punishment prescribed by the English Act and abolish the sentence of imprisonment. And the provision in S. 15 as to the pawnbroker's right to detain persons suspected of an offence seems to provide a needless rigour in the law. It is well known that while the English Law contemplates arrest and detention by a private person under certain circumstances, the Indian Law does not recognise such a right. It is somewhat extraordinary that the right of seizure and detention of an offender should be conferred by this Bill on the private citizen. A right to detain the stolen article and to complain to the Police should be quite sufficient in most cases. Otherwise, the liberty of the subject is in danger of jeopardy at the hands of an over-zealous or unscrupulous pawnbroker.

INTEREST AND ACCOUNT.—The provision in the Bill for a maximum interest rate of 6¼ *per cent.* per annum has been criticised by pawnbrokers as too low a rate; the rate, however, is not unduly low in view of the facts that the loans in such cases are secured loans, and

the Contract Act provides easy means for realisation of the debt; and further, the interest rate in general would seem to be looking down in India. The provision that the accounts should be kept in English or in the language of the locality as may be prescribed has evoked protest from North Indian pawnbrokers; the account book while undoubtedly a weapon of offence for the pawnbroker is also looked upon under the Bill as a shield in favour of the pawner, and the above provision would seem to be justified.

Subject to the criticisms above referred to, the Bill under review is a beneficent piece of legislation, and the fact that it is sponsored at a time when a popular Government is not at the helm of affairs is no ground for viewing it with any disfavour.

B. V. VISWANATHA AIYAR.

JOTTINGS AND CUTTINGS.

A Jocular Predecessor.—While Mr. Justice Darling was perhaps the most prolific in the way of enlivening the progress of a case by a series of *bons mots*, there were those on the judgment seat before his day, who, if not quite so prodigal in the scattering of witty sayings in the course of a case, could yet enliven them with a humorous remark. Those whose memories go back to the days when Baron Pollock was still on the Bench—he was the last survivor of those bearing the judicial title of Baron—will recall him wearing the coif, the distinctive mark of the old serjeants, and every now and again making a little joke, which was all the more effective by reason of the absence of any jocular features on the Baron's countenance. Not indeed that he ever sought to court the name of a wag. But at least on one occasion he made a very happy remark which tickled those who were within earshot, if it did not altogether please them at whom it was directed. On the occasion in question the Baron was trying a case which turned on what constituted " necessaries " for a minor. On one side there was a somewhat decrepit and elderly Q.C. whose marriage to the mature daughter of a patrician house had occasioned a good deal of ironic banter from his learned friends. The opposing side was captained by a silk who, although younger than his opponent, had decidedly the advantage over him in the matter of olive branches. The question in dispute in the case was whether a piano constituted a " necessary," the childless old Benedict urging that it was, while his opponent, the paterfamilias, strenuously argued that it was not. At last the former began to allude somewhat pompously to his married experience, being, it was said, rather fond of doing so by reason of the augustness of the alliance. " As a married man," he said, " I can speak with some authority on these matters, and I have always understood that a piano was a " necessary " for one in the position with the minor in this case occupies." This

oration was rudely broken in upon by his opponent, who remarked that "my learned friend boasts of his married experiences, but I must remind him that as a matter of fact he only entered upon the connubial state comparatively recently, whereas I have not only been married nearly 20 years, but am the father of a large family, while in that respect, so far as I am aware, the union to which my learned friend refers with so much complacency has not proved equally fortunate." This onslaught naturally provoked the opponent almost to madness, and he jumped up and began to protest as vigorously as his wrath would allow him, for the titter in court was becoming somewhat unpleasant at this stage. Baron Pollock intervened and threw oil upon the troubled waters by quietly remarking: "Gentlemen, I think we had better confine ourselves to the issue in this case." Could anything have been neater and so singularly apropos?—*L.T.*, *1940, p. 288.*

Limitation on Right of Appeal.—The suggestion that litigants should be limited in their right of appeal is one which has often been advanced by reformers, and is again learnedly discussed in a recent work published by the Cambridge University Press under the title "The Machinery of Justice," from the pen of Mr. R. M. Jackson. According to the author, one appeal and one only should be accorded even to the most pugnacious of litigants who may desire to test the accuracy of the decision of which he complains. In recent years, it is true, there has been a slight diminution in the number of appeals competent in ordinary civil cases by the elimination, now a good many years ago, of the Divisional Court, but there still remain the Court of Appeal and the House of Lords. To the latter tribunal the would-be appellant must obtain the leave of the Court of Appeal or that of the House itself, but it has been noticeable that when leave has been refused by the Court of Appeal the House has in a number of cases granted the necessary permission to bring on the appeal. Somehow in the old days our forefathers contrived to get on without so many appellate tribunals, and in some of the Courts the difficulties that arose at times were surmounted in singular fashion. Thus, in the old Court of Exchequer which was manned by a Chief Baron and three puisnes an equal division of opinion sometimes occurred and when that happened the Chancellor of the Exchequer was called in to give the casting vote. We read that in one case in 1735—*Naish* v. *East India Company*—the services of Sir Robert Walpole, the then Chancellor of the Exchequer, were requisitioned, and after a re-hearing lasting three days he gave the casting vote in what was regarded as a matter of great doubt and difficulty. Nowadays we see the Chancellor of the Exchequer but once a year in the courts, his functions there being limited to the settling of the list of sheriffs for the ensuing year.—*S.J.*, *1940, p. 909.*

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INFLUENCE OF ENGLISH LAW IN INDIA.*

At all times in the history of the world the influence of the civilisation and culture of one community or race over those of another is a more or less continuous phenomenon. The influence arises from such opportunities of contact as trade, geographical situation or colonisation. It results in the benefits or achievements of one civilisation being imparted to another and thus helps the progress of human civilisation as a whole. The influence of empire in the sense of political domination of one people over another is rarer and less normal but likely to be more powerful and enduring than the sources of influence just mentioned. Such influence has an unfavourable side as it is attended with injury, great or small according to circumstances, to the life and character of the subject people but that it may also have a beneficial character has a striking illustration in the history of the Roman Empire. This Empire gave the people under its sway the benefits of peace and security for about five centuries when it broke up as a result of the barbarian invasions in the fifth century A.D. When it fell, it left two great and priceless legacies for the life and civilisation of Western Europe, *viz.*, its religion and its law. After the conversion of Emperor Constantine, Christianity spread rapidly and replaced paganism in the Empire. When the Empire fell the Roman church retained and in course of time extended its authority and influence. It was ultimately able by effecting an alliance with the temporal rulers to organise a Christian Commonwealth in Western Europe known as the Holy Roman Empire. It became thereby a great unifying force and preserved Europe from the forces of violence and disruption during the Middle Ages. The other great link of unity in

*Paper read by Mr. S. Ramaswami Aiyar, B.A., B.L., Advocate, on 20—9—1940, at a meeting of the Madras Advocates Association under the presidentship of the Hon'ble Justice Sir S. Varadachariar.

mediæval Europe was Roman law. It was received as the civil law of the countries of the Holy Roman Empire and sustained social order and the authority of the state for several centuries. While the Roman church declined in its power after the Protestant Reformation, the Roman law outlived it and remained as the law of those countries until modern times. Through these countries Roman law became the law of others outside Europe like Ceylon, Dutch East Indies, South Africa and parts of North and South America. By its great merits as a scientific jurisprudence, rich in its rules and applicable to widely differing conditions of time and place, it has deeply influenced the legal system and codes in force in the modern world.

The influence of the British Indian Empire on its people has been considerable and continues through several agencies such as law, religion, language and administration. Any fair or comprehensive view of this influence and its credit and debit sides is possible only at some future time when the period of conflicts is over and it can be known how far such influence has enabled the Indian people to attain a higher political stature and better conditions of life than they have at present. At the present day the whole subject is involved in acute controversy which is outside the range of this paper. But it is possible and indeed necessary sometimes to evaluate particular sources of influence for guiding our attitude to questions of practical importance in the present or immediate future. This is especially true in the case of the English law and legal system in force in our country because with the passing of provincial administration in the spheres of law and justice into Indian control questions of replacing or refashioning the whole or part of the existing system have begun to attract attention. With Indian control over these spheres becoming more complete in the provinces and in the central government in the near future such questions may become live issues at any moment. We have occasionally heard views expressed in recent times in favour of a wholesale abandonment of the present legal and judicial system and a reversion to a system of village tribunals which is believed to have functioned efficiently at an older time. I have therefore ventured to examine some of the main features of the English legal system in force in our country and the place which it occupies in Indian life and polity at the present day.

The characteristic features of the English legal system may be stated to be threefold; its judicial system, its laws and last, the doctrine of "Rule of Law" which enforces equality before the law even as between the subject and the state and its officers.

The judicial system of England consists of two parts, the judiciary and the legal profession. The judiciary is separate from and independent of the executive and is recruited entirely from the ranks of the legal profession. It is assisted by juries in the trial of civil and criminal causes. These circumstances as well as the terms and mode of judicial appointments have enabled the English courts to build up a reputation for a high degree of efficiency and integrity and to be regarded as the champions of popular rights and liberties. The decisions of courts conform to statute law or precedent and are subject to effective control and supervision by a Central Court at Westminster. By reason of its training, privileges and emoluments the legal profession plays a great part in the work of the courts and the presentation of opposite viewpoints by trained lawyers enables the courts to decide cases in accordance with settled rules and precedents and not arbitrarily. These features of the judicial organisation are designed to secure uniformity and certainty in the justice of the courts and prevent them from becoming instruments of oppression. The main features of this system have been introduced into India with important modifications required by local conditions, such as restriction of the system of jury trials to certain classes of criminal cases or the mode of recruitment of the judiciary. The importance of establishing central courts for effective control of subordinate courts in a large country like ours can hardly be exaggerated. The absence of such control was a grave defect in pre-British justice. The East India Company made various experiments with dual sets of courts but finally the High Courts in the provinces were invested with complete powers of supervision and control over the subordinate courts in those areas and their decisions are liable to further control and supervision by the Privy Council in England and now also by the Federal Court at Delhi.

The second feature of the English legal system is its laws. These laws are the result of a slow and orderly evolution in response to the needs of a people advancing in civilisation and prosperity. This circumstance has imparted to the English law a richness and comprehensiveness which have made its importation valuable in the changing social and economic conditions of our country. The establishment of original and appellate courts by the East India Company in the large areas which it began to acquire in the second half of the 18th century was followed by the promulgation of laws known as 'Regulations'. Lord Cornwallis played a great part in organising our judicial system and two of his contributions to it are his collection of those regulations and his institution of a legal profession by licensing vakils to plead before the courts and providing them with legal training. These regulations and the great codes of

substantive law and procedure which took their place in the 19th century substantially reproduce the principles of English law and govern the decisions of our Courts except in the regions of Hindu and Muslim family law and customary tenures. We must remember that though we had developed codes of laws in certain spheres of law like family law and succession there were large gaps in our indigenous jurisprudence requiring to be filled up by English law such as the law of contract, evidence, easements, administration of estates of deceased persons. What is perhaps more important is that the promulgation of uniform codes of laws throughout this vast country and their enforcement by a judicial system organised in the manner described already were features in respect of which the indigenous legal systems were unfortunately defective and should have resulted in a great improvement in the quality of justice that was available to our people when those systems were in force. I believe that it is not too much to claim for the English legal system that its introduction in India is perhaps the greatest single factor in producing conditions of civil order in which the large mass of our people could live their lives in peace and contentment and without fear of oppression and injury. With the elements of a civilised life thus secured our people have been enabled to entertain higher ambitions of securing unity and independence and raising their political and economic condition to the level prevailing among the foremost nations of the world.

The third feature of the English law is the rule of law and its application in India has produced results of a far-reaching character. The assumptions underlying that rule in England are the sovereignty of a democratic Parliament and the equality of all people rich and poor, official and non-official, before the law. By the application of the rule in India even the humblest ryot or citizen is able to pursue his remedy against the Government and high executive officials and challenge the validity of their acts, and even the competence of legislation. This was certainly a new experience in the life of the Indian people accustomed to reconcile themselves to official or royal disfavour and could not have failed to produce in them a sense of self-respect and independence as well as a consciousness of their power and position in a democratic state.

In speaking of such results of the introduction of the English law and legal system in India I do not ignore the evils, often of a grave character, in their working in India. We are only too familiar with the abuses to which our courts and their processes have been liable, such as perjury and subornation of evidence, vexatious litigation resulting in the ruin of families and often of whole villages. But serious as these evils are, we must recognise that the organisation of a judicial and legal system in

the manner described above should have relieved our people from far greater dangers of injustice and oppression. Besides it will appear on careful examination that these evils cannot be ascribed to any of the basic principles of this system which are indeed designed to prevent them. On the other hand they are due rather to failure to make suitable changes and adaptations in particular rules of substantive law or procedure. For instance the compulsory registration of wills, adoptions, authorities to adopt and marriages would avoid so many disputes that often take up the time of our courts. The evil of litigation due to the uncertainty of law is remediable by legislation and codification. The machinery for reform under the English legal system is twofold, first, the power of courts to meet new situations by the mode of interpretation and extension of old rules and precedents; second, parliamentary legislation. In a country like England governed by a democratic parliament the danger of a break-down in the legal system or of grave public suffering due to bad laws must be far less than in any autocratic state. Though the Indian legislatures have not obtained sovereign powers they have had for a long time past freedom to make necessary reforms in law and procedure and have often done so. It must also be remembered that there has been far more wasteful litigation due to uncertainty in the Hindu law than that attributable to defects in the rules of English law applied in this country. The great evils of excessive cost and delay of litigation are also remediable by administrative or legislative action.

There are other evils in the working of our legal system, which are not easily remediable. They arise from the disorganised conditions of the social and economic life of our people. In mediæval England perjury and subornation of evidence, intimidation and bribery of witnesses and juries were serious menaces to the judicial administration but they began to disappear in an era of commercial and industrial expansion and prosperity. In India we have not entirely emerged from such conditions. Disputes about possession of immovable property and family quarrels abound in our Courts and give great opportunities for perjury and fabrication of evidence. The prevalence of such abuses in the criminal courts leading often to perversion of justice and oppression is also notorious. These evils have, however, their roots in conditions external to the legal system though they cannot fail to infect and impair parts of the system itself. Cases like the Bhowal Sanyasin's recently decided by the Calcutta High Court, though not always so titanic in dimensions abound in our Courts and call for a decision on the truth of a will, a marriage, an adoption, the paternity or identity of a person or the possession of property. In England there were cases like the Tichborne case but they are now rare in that country and out of tune with the prevailing

temper of the people of that country or any other civilised country and their notions as to the true functions of their law courts.

It is therefore difficult to accept the suggestion that the remedy for such evils is the abandonment of the whole system with its paraphernalia of judges, lawyers and precedents and a reversion to an older system of justice of which Village Panchayats are said to be a principal feature. Even assuming that the people of an older age were satisfied with these tribunals and with the quality and effectiveness of their justice it is too large an assumption that the people now would be content to submit their disputes to such tribunals rendering merely arbitrary or discretionary justice and not controlled by rules or precedents or by any appellate or revisional courts. It seems to me that these tribunals will neither command public confidence nor deserve it. If such control is essential and is introduced it is difficult to see in what essential respects this system would differ from the present. I do not deny that with suitable checks and control a large proportion of petty disputes may be relegated to rural tribunals. This would, however, cover only a small fraction of the litigation that is inevitable in a large country with a growing population and expanding commerce and industry. The abandonment of a legal system and of laws which have been slowly evolved to suit the needs of a people advancing in their trade and industry cannot therefore be a wise suggestion.

There is no doubt, however, that there is real dissatisfaction with some features of the present system. As I have already said the remedy for some of its evils is in part to make necessary changes and adaptations in the judicial machinery or in substantive law and procedure. For the rest we must await a new order of amelioration in all aspects of our life in this country.

In view of the assertion often made about the superiority of pre-British laws and systems of justice in India to those now prevailing, I think it may be useful to set out the principal features of those laws and systems and compare them with the law of England in the 18th century when it was introduced in India. The comparison will be instructive and will show that English law and justice had attained a greater degree of development and were more suited to the needs of a progressive society than the indigenous systems of law then in force.

When we speak of pre-British justice we have to distinguish between the period immediately preceding British rule in the 18th century and an earlier age which represented the heyday of Hindu and Muslim rule. The former was a period of anarchy and confusion which followed on the decline and disintegration of the Moghul Empire. English law and procedure should have come as a great boon to the people in the areas in

which that law was introduced. The following extracts from the Fifth Report and other well-known authorities give us an idea of the conditions in Bengal at that time:

"The subjects of the Moghul Empire in that province derived little protection or security from any of these courts of adawlat; and in general, though forms of judicature were established and preserved, the despotic principles of the government rendered them the instrument of power rather than of justice, not only unavailing to protect the people, but often the means of the most grievous oppressions under the cloak of their judicial character." (From the Report of the Committee of Secrecy in 1773.)

"The Nawab Nazim was the head of the system of criminal courts and under him there were a series of criminal courts held by his deputies in Moorshidabad, his capital in Bengal. In the country criminal justice was administered by the Zamindars. It was a system under which extortion and oppression were rampant. The Nazims exacted what they could from the Zamindars whom they left at liberty to plunder all below" (Parlt. Papers, 1812, vii, 5; Holdsworth, History of English Law, Vol. XI, p. 174 from East India Company's Reports.)

"The Zamindars had also a police power and were bound by the terms of their tenants to arrest criminals and if they failed to do so were answerable to the injured person. But this system was wholly ineffective because it was notorious that the Zamindars connived at or actually committed the crimes they were supposed to suppress."

"The company inherited from the Moghul Government every evil that could afflict a political system; a disorganised and corrupt judicature and incompetent agents. Dacoity was rampant and there was no ordinary security in the land. The new courts although by no means perfect brought great relief to the ryots and talukdars, and within a short time began to foster confidence in the company's administration." (Ramsbotham, Camb. History of Empire, IV, 416).

"For the first time in living memory the province was placed under a government strong enough to prevent others from robbing and not inclined to play the robber itself;" Macaulay, Essay on Warren Hastings.

When we turn to an anterior period of time when Hindu and Muslim laws flourished, we find that they had developed a mature jurisprudence in certain spheres of substantive law like the laws of property, succession, marriage and family law. It is, however, not so clear that they paid the same attention to remedial law and procedure that the English law did from the 13th and 14th centuries. It must not be forgotten that in times of imperfect social order the law of remedies is far more important for the aggrieved party than codes of substantive law declaring rights and duties, just as in the lawless conditions which prevail in international relations it is useless to have a declaration of rights of world citizenship without effective remedies to enforce them. So we find that the practical sense of the English people made them evolve a judicial system and procedure which would confer on the individual subject effective protection against wrongdoing and their judges and lawyers concentrated their attention for several centuries on perfecting the processes of their Courts and their writs and forms of actions.

There are some learned writers in India who have endeavoured to make out that Hindu and Muslim courts had also perfected their laws of procedure which indeed according to them were comparable in many parts to such modern codes as the Civil Procedure Code, and the Evidence and Limitation Acts. Mr. Gururaja Rao's "Ancient Hindu Judicature" (1920) and Mr. Wahed Husain's "Administration of Justice in Mughal India" (1934) seek to establish this theory and describe in detail the judicial procedure and adjective law of Hindu and Muslim Courts. While such information is valuable, it is, however, far more important to know how and in what areas of this vast country these theoretically perfect systems of law and procedure were administered and whether they were improved and altered to suit new needs and conditions in the course of centuries. It is far more easy to enact laws than to administer them and in the widely varying conditions of different parts of India and at different times and periods these systems of law and procedure could not have had a uniform application and indeed if applied at all should have demanded constant alteration and adjustment. On these important matters authentic information is lacking in India while in England records of forms of actions, pleas and decisions of courts are available from nearly the 12th century and have formed the subject of research and study. This absence of information is by itself a sinister feature of our legal history. It indicates that during the long centuries the people had not obtained the benefits of a legal or judicial system which aimed at impartial or uniform application of laws and customs. There were able and just Emperors as well as able and just officials or judges but even in the best of times their justice was arbitrary though benevolent. The position of people living under such a system or want of it could hardly have been satisfactory on account of the chances of oppression and injustice to which they should have been liable. That this was the position is clear also from other well-known facts. The absence of a strong central Government was a defect common to Hindu and Muslim rule which should have led to laxity in control over the judicial administration especially in outlying parts of the empire. The indicia of a judicial system which aims at uniformity and certainty in its justice are records of judicial proceedings and trained judges and lawyers who can interpret laws and precedents. Such indicia had appeared in England at a very early time but were absent in India. The existence in England of a legal profession from which judges were recruited tended to create a strong body of professional opinion which profoundly influenced the course of justice and evolution of law in England. There were grave defects in the substantive law and procedure of England especially in its criminal law, which were due to historical and other causes and persisted till a late age, but a

strong body of professional opinion and the ingenuity of lawyers and judges helped to relieve the law from the evil operation of such defects and to make it respond to new situations. On the other hand in India the law continued to be more or less in a primitive condition and it fell to the East India Company to remove serious defects in it. For instance the Muslim criminal law had three kinds of punishments, first, retaliation including the price of blood; second, prescribed penalties and third, discretionary correction and punishment. The Fifth Report of 1798 states that the nature of the first punishment was alone sufficient to require the interference of the Company's Government with the 'futwas' or sentences of the Nazim. The Company's Government also abolished certain distinctions made by Abu Hanifa and directed that in determining punishment for murder the intention of the party rather than the mode or instrument used should be considered. The Company's courts also commuted sentences of mutilation to imprisonment and hard labour. They supplied the deficiencies of the Mahomedan law in awarding adequate punishment for certain crimes which were rampant, *e.g.*, dacoity, gang robbery, banditry, perjury, forgery, subornation of evidence, female infanticide which was prevalent among Hindus. They abolished the custom then prevalent of levying as commission a fourth part of the value decreed on the decision of suits and all other fees and arbitrary fines. It must also be mentioned that both before the royal courts and before village or communal panchayats primitive modes of trial by oath and ordeal prevailed. The above description of the state of Mughal justice is supported by the works of such well-known authorities as Prof. Jadunath Sarkar and Messrs. Edwards and Garett of the Punjab Service. Whatever was the state of justice in the chief cities it should have been chaotic in the outlying provinces over which the central government's control was imperfect. In these extensive areas aggrieved parties either resorted to self-redress by retaliation or otherwise or sought the not always reliable or effective verdicts of the local Zamindar, official or panchayat.

The decision of civil and criminal disputes by panchayats was a well-known and ancient feature of Indian life and history but it is necessary to bear in mind that there is no evidence that the panchayat was at any time part of a legal or judicial system in which its decisions were in practice controlled by any revising authority. On the other hand its prevalence during the centuries preceding British rule was the result of weak central government which left local government to villages and townships and did not interfere with their management of their affairs so long as they paid their quota of revenue. Therefore political troubles or change of governments and rulers did not prevent this kind of local government from continuing in its

own way. As a matter of fact in times of disorder and disturbance the people clung to their village or caste organisation as the last remnant of civil government available to them and had their legal and social problems satisfied by that agency. The judicial panchayat had in it the elements of the jury system and may have often been successful in dispensing simple and ready justice such as was appreciated in a former age. But in the absence of effective control it was liable to gross abuse, corruption and oppression. This appears to be borne out by the enquiry made by Mountstuart Elphinstone about the working of panchayats in the Mahratta country and is discussed in a book entitled "Panchayats under the Peshwas" by H. George Franks who had access to original records in the Record Office at Poona. This author states that under the Mahratta rulers whose military activities left them little time to organise any system of judicial administration rich and powerful men could bribe and intimidate panchayats or assemble a rival panchayat to upset the verdict of another. The learned author's reference to the practice of panchayats to discriminate in the award of punishment gives us a glimpse of the quality of justice then available. It is said that if a poor man killed a rich man he got the penalty of death or mutilation; if a poor man killed his equal, he could buy off this penalty by payment of a fine of Rs. 350; if a rich man killed a poor man he always paid the fine and not the penalty. It is, however, probable that fellow-feeling and the democratic instinct made these tribunals generally fair in their verdicts and they dispensed such justice as the people of the time understood and appreciated. But it is a great mistake to regard the panchayat in the form and conditions in which it prevailed as having ensured an ideal form of justice in the past and therefore worthy of replacing the judicial institutions of the present time. The suggestion that a reversion to a system of village autonomy of which the panchayat was a part is a panacea for many of our difficulties appears therefore to be unsupported by historical facts. It is, however, beyond dispute that with proper supervision and control the panchayat is a useful agency especially in rural areas for deciding many disputes and quarrels which now swell the work of the regular courts of law. It has therefore been given a place in our judicial system by legislation like the Village Courts Act.

We now turn to the system of law and justice in England at the time of its reception in India in the 18th and 19th centuries. It is well-known that English law is not to be found in any great code like the Code Napoleon of France or the codes of other countries in Europe but is the product of a slow evolution during several centuries. It is therefore necessary for understanding its nature, content and influence to advert not merely to the chief events in this evolution but also to some of the more prominent

events in the history of the English people and to the forces, political, economic and religious, which determined the character of their laws. Before the Norman conquest the English people had laws of a primitive kind and had not learnt to submit to any State authority in the administration of justice and had not attained any uniform system of law or procedure. Though England was for more than three centuries a province of the Roman Empire and governed by Roman law the Anglo-Saxon invasions of the 5th century A.D. had the result of destroying all traces of the old legal system and replacing it by institutions which in their origin were purely Germanic. In later times English law was deeply influenced by ideas derived from Roman jurisprudence but this was due in part to the administration of the Canon law by the church courts and functionaries and in part to the study of Roman law by judges and lawyers but not to any surviving traces of the original dominion of Rome. From the 5th to the 9th century the country was invaded by different tribes and it was only in the 10th century that it was unified into one kingdom. Even then justice was in the hands of local assemblies like the Hundred and the shire or of landowners who held their own courts. There was yet no King's court or Common law. These local and feudal tribunals were more in the position of arbitrators to whom the submission of the aggrieved party was optional as he had the alternative of self-redress or private vengeance against the wrong-doer. A large part of the Anglo-Saxon laws was concerned with tariffs of compensation even for serious crimes like murder and it was open to the aggrieved to accept money and give up the blood feud or vengeance. The result of the Norman conquest was the introduction of precise and orderly methods into the government of England. By the end of the 12th century largely as a result of Henry II's reforms, judicial administration had been improved and had begun to acquire some modern features. The King's court began to assume importance and to step into the place of the local and feudal courts as well as of the courts of the church, and many serious crimes became pleas of the Crown and heard in that court and not in the local courts where primitive methods of trial by duel and ordeal were in vogue. The institution of trial by jury had become a part of the procedure of the King's court and contributed to its popularity and to its being preferred by suitors to the rival courts. Other attractions of that court were the remedies provided by the issue of appropriate writs for various wrongs, principally for dispossession of land, disputes about which then went before the feudal lord from whom the land was held. A most valuable feature of Anglo-Norman justice was that records of proceedings of the King's courts were kept by its clerks and officials. This practice ultimately paved the way for the authority of precedent in English law. In the beginning of the 13th century the famous Magna Carta of the year 1215 made a memorable declaration of rights and

liberties of the subject and became in later times a priceless weapon against autocratic monarchy. Its provisions making the assent of the barons essential for certain acts of the King contained the germs of the idea of Parliamentary sovereignty. In the 13th and 14th centuries the King's Court had become dissociated from the King and split up into the courts of the Common law and the King's Council. Thus the courts of law became distinct from the administration and came to be presided over by professional judges. About the year 1300 we can see the beginnings of an organised legal profession. The Inns of Court had been founded and gradually the tradition was established that the judges of the Royal courts should be drawn from the ranks of the most eminent lawyers. By the Statute of Westminster II (1285) the common law courts extended their powers by inventing new writs to suit the advancing needs of the people. On account of the influence of the church which encouraged the practice of making dying dispositions in its favour, wills of chattels came to be recognized and the rights and duties of executors were declared by the Magna Carta (1215) and the Statute of Westminster (1285). By far the most outstanding event in English legal history in the 13th century was the summoning of a representative Parliament by Simon De Montfort in 1265. In 1295 the King (Edward I) himself summoned a Parliament to help him with money and counsel in his war with France. Since that year Parliaments have been summoned in continuous or all but continuous succession and parliamentary government became later on the principal feature of the constitution of England. The year 1295 was also memorable because Edward I who was noted for many law reforms began the practice of recording the Statutes of the Realm. By the end of the 13th century the foundations of a modern judicial system had been laid and the twofold sources of the law which the courts should administer, *viz.*, precedent and statute, were reaching recognition and becoming matters of record. During the succeeding centuries the legal structure so erected received numerous additions and alterations required by an advancing civilisation and a population growing in numbers and prosperity. In the 14th century the Court of Chancery had begun to recognise Uses and Trusts and exercise a distinctive jurisdiction which in later years enriched English jurisprudence. This century saw the beginning of written pleadings in the common law courts in place of the old oral statement and answer by the opposing counsel and of the Year Books which were the first law reports in England. The Year Books were anonymous compilations of notes of cases in the King's courts and gave way later to the works of particular and nominated reporters and ultimately to reports issued under official authority. By 1700 the supremacy of Parliament and of the common law courts over the executive had been established as a result of the Revolution Settlement and the "Rule of law" had become a valuable and unique feature of the English constitution. By the end of the 18th century the great

increase in commerce and territorial possessions and the economic and social changes following on the industrial revolution resulted in the addition of large bodies of law in the sphere of contract, tort and mercantile law and of legislation especially in the domain of public law and administration like the poor laws and the laws of local government. Sir William Holdsworth points out that the expansion of England in the west by the growth of the American colonies which she lost later and the expansion in the east by the acquisition of the Indian Empire had important effects on English law by making it no longer an insular but a world system of law and by helping the formation of a colonial constitutional law relating to such matters as the position and powers of governors of colonies and of colonial legislatures, the Crown's prerogative in the colonies, the law applicable to settled and conquered colonies and so on. The position of Colonial courts and the effect of their judgments raised questions which pertain to a body of law known as Private International Law or Conflict of Laws. The union of England and Scotland by the Act of Union in the 18th century enriched the laws of both the countries. Scotch law had been formed on the Roman model and was free from the technicalities of the English system of pleadings. Scotland had from an early time a system of registration of deeds. Its closer touch with continental legal systems gave it a law of bankruptcy which was superior to that of England. Scotch law never permitted a creditor to arrest his debtor on mesne process as English law did. In Scotland, a prisoner was not refused the aid of counsel; the institution of criminal proceedings was under the supervision of a Public Prosecutor; and the insistence of verbal technicality which was a blot on English Criminal Procedure was unknown. These features of Scotch law influenced English law just as the principles of English mercantile law were imported into Scotch law. In the 18th century great principles were established in the sphere of liberty of the subject, first by the decisions in the cases arising out of the "general warrants" which negatived executive prerogative to arrest persons otherwise than in due course of law and secondly, by the passing of Fox's Libel Act which enabled juries to give general verdicts in cases of libel including political libel or sedition. This Act was valued as a great safeguard for the liberty of the press and freedom of discussion. In spite of these features of its development the English law and procedure of the 18th century had grave defects deplored even by contemporary opinion. This was due to the fact that the pace of law reform was slow but in 1776 Bentham's Fragment on Government had been published and his zeal for law reform and codification bore fruit in the 19th century. In this century there were large additions to substantive law brought about by the great increase in trade and industry such as the law of joint stock companies, patents, trade-marks, employer's liability. The memorable reforms by way of simplifying civil and criminal

procedure and unifying different sets of courts in the Supreme Court have been reflected in the Indian Codes of Procedure. The rules of prescription and limitation of claims to real property enacted by the Statutes of 1832 and 1833 were embodied in our law and should have contributed not a little to security of titles and property in India.

The building up of the English legal system was primarily the work of lawyers and judges during several centuries but we must not forget that there have been some imponderable factors which have exercised great influence on English law. The introduction of Christianity in England in the 7th century (664 A.D.) brought with it certain moral ideas and revolutionised English law. Christianity had inherited from Judaism an outlook upon moral questions which was strictly individualistic. The salvation of each separate soul was dependent on the actions of the individual. This was in contrast with early Anglo-Saxon laws which looked not to the individual who did the act but to the group or family of which he formed a part. After the spread of Christianity responsibility shifted from the group to the individual who did the act; and then the intention of the actor became material for judging the nature of the act. The Church also introduced ideas of political organisation and of law and of morality far higher than those possessed by the barbarian tribes. The leading ideas of the Christian Fathers were those of the Roman jurists. The Church inherited some of the ideas of Imperial Rome and its teaching tended to add a new sanctity to the office of the King and thereby to the authority of the state which made for the cause of law and order. The church also introduced the customs of making a will and conveying land by written documents. The lawyers and judges of the 12th and the 13th centuries were ecclesiastics learned in the Canon law which was itself an adaptation of the Roman law to the needs of the Church and their influence on English law was considerable. The writ of 'novel disseisin' invented for dispossession of land had a Roman origin and its modern counterpart in India is the action under S. 9 of the Specific Relief Act. In this and many other respects English law was influenced by the legal renaissance of the 12th and 13th centuries in the continent of Europe, a renaissance marked by a revival of the study of Roman jurisprudence by mediæval canonists and lawyers. The second factor to be mentioned under this head is also a religious one, *viz.*, the Protestant Reformation in the 16th century. It undermined the authority of the Church and by denying the position of religion as the basis of civil government it tended to favour absolutism and the divine right of Kings but also let in alternative theories like the theory of social contract and tended to undermine the authority of the King also. Among other factors which influenced English law are the political thought of writers like Locke in the 17th century who pleaded for a limited monarchy and Parliamentary supremacy and the ideas of the

French Revolution in the 18th century which helped the growth of democracy in England.

Indian law to-day substantially reproduces the rules of English substantive law and procedure developed in the manner set forth above. These rules have been in large part embodied in the great codes which have been enacted since the middle of the last century and for the rest they are to be gathered from English books and precedents. The excepted regions are those of personal law and customary tenures. English law is usually considered to have been introduced into India in 1726 by a charter of George I which established Mayor's courts in Madras, Bombay and Calcutta but this is only for the purpose of deciding that later statutory modifications in England should not be applied in India. The Company's courts which functioned in those cities had already begun to apply English law and procedure to cases before them. The charter of 1668 by which Charles II granted Bombay to the East India Company empowered the Company to establish courts and enact laws for the good government of Bombay and directed that these courts and laws may be as near as may be agreeable to English courts and laws. Accordingly certain laws were framed which made provision for such matters as trial by judges and jury, regular sittings of the court, records of its proceedings, levying of reasonable court-fees fixed at 5 per cent. of the value of the claim, appeals from the courts to the Governor, registration of all sales and transactions relating to lands and houses. The second section of the laws deserves special mention. It provided first, that no person should be dispossessed of houses, goods, lands or other rights or suffer corporal punishment for any cause or crime before trial and conviction by a jury of twelve men except as otherwise provided by those laws or any future law and secondly, that no person should suffer penal or civil imprisonment without a specific warrant for his commitment and any such person might be released without bail if the cause or matter were not prosecuted within ten days after his commitment had been certified to the court. Evidently the authors of these laws intended to reproduce the provisions of the Magna Carta in this regard.

The above resume of the principal features of the laws and legal systems of England and India can leave us in no doubt about their comparative state of development and suitability for people emerging from mediæval to modern conditions of life. The English law and legal system had attained a far greater degree of development and were more suited to the needs of a progressive people than the Indian. We cannot be prevented by any sense of pride or other feeling from admitting this fact. The features noted in the English system and its development ensured an efficient judiciary which was independent of the executive and able to maintain effectively but with due regard to the interests of the state the rights and liberties of the individual

in a democratic polity. Its substantive law and procedure had grown with the nation and by their richness and flexibility served the needs of a new age of commerce, industry and empire. These qualities were largely due to its unique feature of having grown through precedents. This feature is often regarded as a demerit of the English system but in reality it is otherwise. It can of course become a great source of uncertainty and confusion but such a state of affairs can be mended by legislation. The function of precedent is to restrict to the barest possible minimum the scope of discretionary or arbitrary action on the part of the judge. Indeed the whole merit of the English legal system appears to be that it thereby limits the danger of injustice due to human factors in the working of the judicial system. Similarly in the administrative sphere executive action is largely regulated in modern times by statutes and rules which leave only a minimum scope for individual discretion.

The introduction of the English legal system in India has in the first place filled up large gaps in our private and public law. Our codes of laws had attained remarkable maturity at a very early time but their growth had been unfortunately arrested except in certain spheres like family law with the result that our judicial organisation and public law were notably inadequate to meet the needs of a large population. In the second place English law has made our people more law-abiding and law-minded than they were before. No doubt it has led to litigiousness but litigiousness is better than lawlessness. Thirdly, English law has introduced ideas of rights and duties which are appropriate to a modern social and economic polity and to regulate the relations of the people in various spheres of life and activity. Lastly, the application of principles of English constitutional law like the 'rule of law' has had incalculable results on the life and spirit of the people. The right to sue the government and its officers in the ordinary courts of law for relief against illegal acts of government has undoubtedly infused a spirit of self-respect, independence and respect for law in the ordinary citizen. Perhaps this has been a greater asset for the growth of democratic movements in this country than the love of democracy and liberty resulting from a study of English language and literature which have however reached only a small fraction of the people. Some of the underlying assumptions of the 'Rule of law' are the absolute supremacy of the law as opposed to arbitrary power, the independence of judges from the executive and their freedom from the influence of politics. These principles are of immense value to the citizen and secure his regard for his legislatures and law courts. Sir William Holdsworth observes that the effect of the doctrine in England was to create a law-abiding habit, *i.e.*, the habit of persons dissatisfied with the policy pursued by the state to appeal to the courts for the proper enforcement or interpretation of the law or to Parliament to change the law. He says that in the great controversies of the 17th and 18th centuries

in England persons and parties who complained of grievances turned to the courts or to Parliament and did not desire to overturn the existing machinery of the law. We can well understand this as we have had recent experience of controversies that arose over the Agriculturists' Relief Act and the Temple-Entry Act in Madras and the Prohibition Act in Bombay. There is no doubt that the rule of law is a valuable safeguard against minority opinion taking to the paths of political obstruction or revolution. It is also a striking illustration of the emphasis laid by the English law on the rights of the individual and the way it co-ordinates these rights to the needs of the state. The rights and liberties of the individual are the results of the practical application of the higher principle of the dignity and sanctity of the human personality, a principle which runs like a golden thread through the whole texture of the law and constitution of England.

I recognise that a due appreciation of the merits of the English legal system in India is beset with certain difficulties. In the first place there are grave defects in the working of the system in Indian conditions. Even in England there have been in recent years loud complaints about the heavy costs and long delays of litigation but these and other evils assume exaggerated proportions in India. I have alluded to these evils and shown that they do not detract from the value of the basic principles of the legal system because they arise either from lack of adequate action by way of law reform and adaptation of law and procedure to Indian conditions or from causes external to the system itself. Secondly it is difficult for many of us to dissociate the English law and legal system from the conditions of political domination under which they were imposed on this country and all the consequences to the life of the people which such domination involves. The difficulty has been enhanced by the political controversies during the last 2 or 3 decades and accounts for expressions of opinion unfavourable to the whole legal system. But a more detached judgment on our part has now become necessary because as I have said, questions of replacing or fashioning the whole or part of the existing legal system may become live issues in the near future. I venture to say that the great codes of substantive law and procedure which have been slowly perfected during the past 100 years will in large part continue to be the law in a free India. A country can adopt the laws, language and culture of another without accepting the domination of the latter. In the last century many countries in Europe and elsewhere modelled their laws on the Code Napoleon of France. At an earlier time the United States of America adopted English law after achieving political independence. In recent years renascent Turkey adopted the Roman script in place of the Arabic, and European codes like the Swiss civil code in place of the older system of Islamic law. So I maintain that neither prejudice nor sentiment due to historical causes or political controversies will stand in the way of our

adopting large parts of the legal and administrative systems perfected in the course of the last two centuries. I recognise however that many parts of the English law especially in the sphere of procedure and judicial organisation may undergo substantial alteration to suit a changed polity. For instance the 'rule of law' which is only a rule of procedure or remedial law is a valuable and vital part of the English law. But there is a growing section of opinion in England and elsewhere that the administrative tribunals in the French system perhaps afforded more speedy and effective and less expensive justice in disputes between the citizen and the state and that they avoided the dangers of undesirable antagonism arising between the judges and the executive by reason of such disputes being relegated to the ordinary law courts under the doctrine of rule of law. With the extension of governmental activity in recent times and new types of legislation conferring powers on various administrative authorities and officers the jurisdiction of law courts to issue writs and injunctions interfering with the exercise of statutory powers may suffer diminution in the future. Again it is not an unlikely contigency in the future that a competitive legal profession whose numbers and emoluments are determined by the economic laws of supply and demand may be considered to be productive of more harm than good and unsuited to the circumstances of our country. In this and other ways the English law and legal system may in course of time be subject to drastic adaptation and alteration. Above all the present war may bring about catastrophic changes in existing forms of social and political organisation and in the principles of law which are an integral part of such organisation. But whatever the future holds for us and others, we cannot underrate the merits of the English law or its services to India.

The Hon'ble Justice Sir S. Varadachariar observed.—The main purpose of Mr. Ramaswami Aiyar's lecture has been to sound a note of caution against the hasty introduction of radical or fundamental changes either in the system of law or in the system of legal administration now in vogue in India. I have been of much the same opinion and as I have heretofore given expression to my views on some occasions, I shall briefly deal with the matter. I recognise that we are at a disadvantage in discussing this topic, because we—both of the bench and of the bar—are likely to be suspected by the outside world as being vitally interested in the maintenance of the present system for our own advantage. I am anxious that the subject should be examined by the outside world on the merits of the arguments advanced without reference to the persons from whom they emanate. It is a danger attaching to most discussions of important sociological questions that they are not always discussed on their true merits and the conclusions are often warped by bias or

prejudice. The question which Mr. Ramaswami Aiyar has referred to has in a sense already become a live issue and will continue to be a live issue. Members of the Bar who naturally enjoy more liberty than members of the Bench in dealing with questions of this kind would do well to take steps to create an intelligent public interest in the question rather than merely ask the outside world to accept their own opinions at their face value.

At the present day, those who propose a revision of the existing legal and other institutions of this country are impelled by a strange mixture of ideas. In one sense they are anxious to go forward; in another sense, perhaps unconsciously, they wish to go backward. Slogans founded upon socialistic, communistic, or the most advanced democratic theories—theories of liberty, equality and fraternity, are strongly in evidence in our midst. At the same time some of the advocates of these very theories wish to go back to the quasi-ascetic ideals of an arcadian life. While not criticising either of these view points, one is obliged to take note of the fact that none of us seems to have much of a choice in the matter. We are as it were dragged along the current of influences and forces over which we have little or no control. There are countries which even to-day would prefer to be left to remain at least where they are if they cannot go back to where they were, but they are unable to do so. The very achievements of science which we all admire and of which we all seek to take advantage make that impossible. There is no longer any possibility of isolation. If that is the present position and if the society in a country wishes to have the benefit of modern conditions, it is no good having an ideal partly going backward and partly looking forward. All of us see the necessity for continuity in our history and in our institutions. But it will be difficult, however, to determine whether the continuity should be with the life of the last 150 years or with an earlier period, overlooking these 150 years.

I also wish to emphasise the fact that we are every day necessarily brought into contact with the outside world. We are anxious to do business with other countries and we want people in other countries to do business with us. If that kind of business intercourse is to be fruitful, the people of those countries should have confidence in the system of laws administered here. Unless a system of administration, similar in all essential respects to that obtaining in other civilised countries, obtained here also it would be impossible to have that degree of commercial intercourse as is desired. The conditions that led to the system of capitulations and special tribunals in certain countries should not be allowed to exist in our midst. Again, you cannot forget the complexity of the problems that come up

before a court of law at the present day. However much one might appreciate the utility of the procedure before village tribunals of the past, which might have been sufficient to deal with the problems that arose in former times which were comparatively simple, it should be realised that we cannot cope with modern conditions and modern political ideas by reverting to a state of things which existed a thousand years ago. We have also to take note of a tendency inevitable in the course of the advance of civilisation, namely, the tendency to substitute for the system of *personal* laws, a system of *territorial* laws. The existence of different personal laws administered in one and the same country is hardly consistent with modern political theories. If a system of territorial law is to replace the system of personal laws it is difficult to conceive of a better collection than those which have been evolved by the courts in India, during the last hundred years, consistently with the conditions in the country. You are aware that in many respects the English law has not been blindly followed here. I understand Mr. Ramaswami Aiyar as only protesting against any blind change in the existing system of law merely on the ground that the adoption of a system of law based on foreign sources is inconsistent with the self-respect of this country. Few of us can be blind to the need for changes in many respects in our judicial administration, either from the point of view of economy or of the speedy disposal of litigation. You should not be against changes or think of a thing as good simply because the particular system or institution has been there for a long time. There is an ancient sloka showing that this was realised even in olden days.

पुराणमित्येव न साधु सर्वम् ।

The main consideration for those to whom it may fall to deal with these questions will be to keep in mind the possibility of reconciling any radical departures whether in the system of substantive law now obtaining here or in the system of judicial administration with the political aspirations of those who are compelled to adapt themselves to the modern international conditions. It is on grounds like these that one should like the public to consider this important question.

SUMMARY OF ENGLISH CASES.

KAY *v.* LOVELL, (1940) 1 Ch. 650.

Solicitor's lien for costs—Extent of charge in partnership suit.

A solicitor in a partnership action is entitled to an order for taxed costs, charges, and expenses properly incurred of and in

reference to the action as solicitor for the party and to a charge on the share of his client which is in Court. Order to be in the form in Seton on Judgments and Orders, 7th Edn., Vol. II, p. 1040, Form 6.

KERR *v.* JOHN MOTTRAM, LTD., (1940) 1 Ch. D. 657.

Companies—Articles of association providing that minutes book should be conclusive evidence of facts stated therein—Other evidence inadmissible to disprove such facts—Cf. *Companies Act* (1929), *S.* 117 (3).

In a suit for specific performance of a contract for sale of shares to plaintiff by a company, the plaintiff sought to lead evidence to displace the record in the minutes book of the company of what took place. The articles of the company provided that the minutes were to be conclusive evidence. The plaintiff can have an opportunity of establishing, if he could, that the minutes were not a *bona fide* record of what took place or that they had been falsely and fraudulently written up after the events with a view to setting up a story which was not in accordance with facts. But where the minutes were a correct and *bona fide* record, they were to be regarded as evidence which is not to be displaced.

PUBLIC TRUSTEE *v.* PEARLBERG, (1940) 2 K.B. 1.

Sale of land—Contract for sale—Rescission by vendor—If possible when action for specific performance pending—Right of vendee to return of deposit.

It is well settled that a vendor cannot rescind a contract for sale of land where he has himself brought an action for specific performance which is pending at the date of the alleged rescission, for a claim for specific performance of necessity implies an affirmance of the contract. The vendee is entitled to counterclaim for return of deposit.

R. *v.* COWELL, (1940) 2 K.B. 49.

Criminal Law—Confession by prisoner alleged to have been obtained by improper means—When prisoner could object to admissibility and himself give evidence.

A confession is *prima facie* admissible if it was made after proper caution and not as the result of any inducement or threat. It is open to the prisoner to object to the admissibility of such confession on the ground that it was improperly obtained and it is proper in such cases to allow the calling of the prisoner him-

self as a witness if the justice of the case requires that it should be done.

HILLS *v.* CO-OPERATIVE WHOLESALE SOCIETY, LTD., (1940) 2 K.B. 74.

Res judicata—Recovery of damages under Employers' Liability Act, 1880, *for personal injuries caused by negligence in the course of common employment—Action at common law against employer for same act of negligence—If barred.*

There is nothing in the Employers' Liability Act, 1880 which confers on an injured workman any cause of action different from that which he would have had by the law of England but for the doctrine of common employment. Where plaintiff has recovered damages under the Employers' Liability Act, 1880, in respect of the matters complained of in the action he is debarred from claiming or recovering any sum in respect of these matters under the common law.

VRONDISSIS *v.* STEVENS, (1940) 2 K.B. 90.

Insurance—Marine insurance against loss of freight—Loss of freight due to impossibility of repair to complete the voyage, and constructive total loss of freight arising therefrom—Liability of underwriters.

A clause in a policy of marine insurance provided "In the event of total loss and/or constructive and/or compromised total loss of vessel, total loss and/or constructive total loss of freight *arising therefrom* is not recoverable." Shortly, after starting with the cargo the ship struck a reef of rock and was so severely damaged that she had to be beached. It was alleged that it was impossible to repair the vessel so as to enable her to complete the voyage with the cargo and so the voyage had to be abandoned. Alternatively it was alleged that as the cost of repair would exceed the value of the ship after repair it was abandoned. In a claim on the insurance policy for loss of freight against the underwriters, on a preliminary issue of law.

Held, if the ship was abandoned because, although the ship could be repaired the cost of permanent repairs would have exceeded its repaired value, the loss of freight did not arise from constructive total loss. But if it was not a matter of expense and if the ship could not have been rendered fit to complete the voyage with her cargo, it may fairly be said that the loss of freight within the meaning of the exception clause arose from the constructive total loss of the ship in the sense that there was a physical impossibility of repair.

SAINT LINE, LTD. *v.* RICHARDSONS, WESTGARTH AND CO., LTD, (1940) 2 K.B. 99.

Contract—Damages for breach—What can be claimed as direct and immediate damages.

The defendants contracted to provide and instal engines in plaintiff's ship. The contract provided that defendants' liability shall not extend to any indirect or consequential damages. On breach of contract,

Held, the plaintiffs were entitled to claim damages for loss of profit, expenses of wages, etc., and fees paid to experts for superintendence. All these heads were not "indirect or consequential".

WELD-BLUNDELL *v.* SYNOTT, (1940) 2 K.B. 107.

Mortgages—First mortgagee exercising power of sale and paying over a larger balance to second mortgagor—Right to recover excess as money overpaid under mistake of fact.

Plaintiff, a first mortgagee having exercised his power of sale, by mistake presented to the defendant the second mortgagee an account showing a larger balance and paid over the same to him. In an action to recover this excess as money paid under a mistake of fact the defendant pleaded estoppel.

Held, the mistake of fact *prima facie* entitled the plaintiff to recover. A first mortgagee is not under any duty to inform the second mortgagee of the true state of accounts between himself and the mortgagor and so the plea of estoppel must fail.

HEYWOOD AND BRYETT, LTD. *v.* HEYWOOD AND SON, (1940) 2 K.B. 145.

Workmen's Compensation Act (1929), *S.* 6—*Claim for indemnity against sub-contractors by the contractors who had paid compensation to sub-contractors' servant who was injured—If could be defeated by showing negligence or breach of statutory duty by the principal contractor which caused the accident.*

The Workmen's Compensation Act, S. 6, contains no limitation of the right of the principal to indemnity against his sub-contractor in respect of compensation paid to an injured servant of the sub-contractor. The right is absolute and the claim cannot be resisted by showing negligence or breach of statutory duty on the part of the principal as causing the accident. Willis Workmen's Compensation, 32nd edition, at p. 20, dissented from.

ENGLISH *v.* WESTERN, (1940) 2 K.B. 156.

Insurance—Motor insurance against third party risks—Exclusion of indemnity against claim by "any member of assured's household"—Sister of insured—If member of household.

A policy of motor insurance provided that the underwriters shall pay all sums which the insured shall become legally liable

to pay by way of compensation for death or bodily injury to any person but excluded liability in respect of death or injury to any member of the assured's household carried in the car. In respect of a claim by a sister of the assured who was himself a member of his father's household.

Held [reversing (1939) 4 All.E.R. 345, *Goddard, L.J.*, dissenting].—The phrase of exception covers only the narrower class, the members of a household of which the assured is the head and the case is outside the exception and the company is liable to indemnify the assured in respect of the claim.

HYETT *v.* LENNARD, (1940) 2 K.B. 180.

Income-tax—Assessee subletting shop owing to closing of that branch—Difference in rent paid and rent received—Whether trade expense.

The assessees who carried on business as a ladies' tailor at some 9 or 10 shops in London and its suburbs took an assignment of a lease for 35 years at an yearly rent of £3,500 without option to determine at an earlier date. Owing to increasing loss the branch business in the leased premises was closed and the assessee demised the remaining term of the lease at a reduced yearly rent of £2,500. The assessee claimed a deduction for the difference in the rent he had to pay and the rent he received,

Held, he was entitled to the deduction claimed.

BEARE *v.* CARTER, (1940) 2 K.B. 187.

Income-tax—Amount paid to author for licence to publish an edition of his book—If capital payment.

Fees paid to an author for obtaining from him licence to publish an edition of his book is capital payment and not assessable to income-tax.

MANSEY *v.* MANSEY, (1940) P. 139.

Divorce—Desertion—Accommodation offered by husband—How far offer to resume cohabitation.

If the husband says he wants to live in such and such a place, then assuming always that he is not doing that to spite his wife, and that the accommodation is of a kind which one would expect a man in his position to occupy, the wife is under the painful necessity of sharing that home with him. If she will not, she is committing the matrimonial offence of desertion.

JOTTINGS AND CUTTINGS.

Lord Hewart's retirement.—Lord Hewart has been the Lord Chief Justice of England for perhaps one of the longest periods in the history of that office, having been appointed to that post in March, 1922, in succession to Lord Trevethin. Possessing a great reputation both at the Bar and in the House of Commons and gifted with considerable forensic eloquence, a trenchant style and a delicate sense of humour, his appointment as Lord Chief Justice was acclaimed with universal satisfaction. Both in civil cases and in the Central Court of Criminal Appeal, he has been responsible for many noteworthy judgments. Lord Hewart is also well known to the public as the author of "The New Despotism," containing a forceful protest against the tendency of recent legislation to permit encroachments on the jurisdiction of the judiciary by the heads of departments being vested with final quasi-judicial jurisdiction in many matters under cover of rules and regulations framed under the different statutes. Lord Hewart retires full of honour and glory and few will be disposed to challenge his claim to be regarded as one of the most successful incumbents of the office of Lord Chief Justice.

Viscount Caldecote's new appointment.—Lord Caldecote's appointment as Lord Chief Justice of England is unique in one respect, namely, that it is almost if not quite the first instance when an ex-Lord Chancellor becomes the Lord Chief Justice. Better known to lawyers as Sir Thomas Inskip, he was Solicitor-General during 1922-1924, 1924-1927, 1931-1932, and Attorney-General during 1927 and 1932-1936. From 1936 onwards he has been a Minister of the Crown in various departments. During the present year he was appointed Lord Chancellor in the place of Viscount Maugham, but after a short spell on the Woolsack he gave place to Viscount Simon, the present Lord Chancellor. As a Minister, Lord Caldecote does not seem to have achieved much success. But his legal attainments are great and undeniable and it may well be that as Lord Chief Justice he has come into his own.

Indian States and archaic rules.—It has recently been stated in the press that in some of the Rajputana States the law and procedure as administered even to-day tend in many cases to be the "proverbial ass" instead of commanding respect. Laws are said to be in force permitting a creditor to chain his debtor and march him along the public streets and allowing animals to be tried for crimes and suitably punished. In 'The Princes of India' Sir William Barton mentions that even in a comparatively modern state like Hyderabad the Koranic law of retaliation still prevails. It may be remembered that a few years ago considerable criticism was occasioned by the procedure directed by a Full Bench in that State to be observed in carrying out the sentences of death

and rigorous imprisonment imposed on an accused, namely, that "the man should first serve three years in jail and thereafter be hanged", ignoring what might be called the principle of the merger of the lesser penalty in the larger in such a case. Even in modern England the laws and rules are found to contain a number of anachronisms. The trial in 1936 of Lord de Clifford for a motoring offence in accordance with the privilege of peerage showed that "the formality of a trial by the House of Lords was an absurd anachronism." The case was entirely one for the ordinary Criminal Courts and the arguments in favour of the retention of the antiquated procedure had no vesture of substance. In fact Lord Atkin described it as an "outworn appanage of peerage."

The remedy both in British India and in the Indian States for getting out of such a condition is surely to have a Law Commission appointed periodically to suggest expurgations of laws which are altogether out of consonance with civilised notions and ideas.

Latin as Legal Language.—In the course of his judgment in a shipping case before the House of Lords last week, Lord Wright entered a strong protest against the use of certain latin phrases, such as "*novus actus interveniens*", "*causa causans*", and "*causa sine qua non,*" as, in his view, they only distracted the mind from the true problem, which was to apply the principles of English law to the realities of the case. English law, as he went on to point out, is quite able to find in its own language expressions which will more fully state the problems in such cases as that before the House, and these should be sufficient. Certainly Latin does not quite hold the place it once did in the vocabulary of the law. For centuries it was the language of our records, and Blackstone, ever a fervent admirer of its precision, termed it the "universal dialect", so adapted, as he considered, to the needs of the nation. Indeed, thirty years after it received its official death-blow, he declared that the laudable intentions which had prompted its disappearance were such as the English language could not satisfy. While we may not be disposed to accept this categorical statement, it is curious to note that not a few Latin phrases have entered into the very texture of our legal vocabulary; phrases such as "*habeas corpus*", "*nulla bona*", "*nudum pactum*", and a large number of others which the lawyer is at least expected to know although he may not find it necessary to make frequent use of them.—*S. J.*, 1940, *p.* 409.

The Two Races of Man.—In his own whimsical fashion Charles Lamb, in one of his delightful Essays of Elia, divided the human species into two distinct races, the men who borrow, and the men who lend, designating the former "the great race".

Lawyers, as such, can have no quarrel with Lamb's two categories, in view of the fact that their services are so frequently invoked by both, by the lenders in seeking to recover the money which they have incautiously advanced and find a difficulty in retrieving by their own unaided efforts, and by "the great race" in the hope of staving off the claims till a more convenient season, or, possibly, setting up some vigorous defence under the Statute of Limitations or otherwise. All through the ages many debtors have shown a decided inclination to avoid payment, and have evinced a wonderful ingenuity in these efforts, although they have not always succeeded in achieving the desired result; and one of the interesting chapters of legal history is that which is concerned with the various means by which pressure has been brought upon recalcitrant debtors to perform the elementary duty of paying their bills.—*L.T.*, 1940, *p.* 350.

In Roman Law.—In ancient Rome we read that, when recourse to the debtor's property was useless, or where none existed, the debtor himself was absolutely in the hands of his creditor. He was not yet actually a slave, but the creditor could load him with chains and, after a certain time, could sell him as a slave. It might, of course, happen that against the same debtor several creditors had claims, and in such a case it was said that the law empowered them to chop the unhappy man to pieces and divide his carcass amongst themselves, the law considerately providing that any error in the division of the spoil should in no wise prejudice the creditors' rights, thus avoiding any quibbling objections such as were successfully urged by Portia in the defence of Antonio. A modern historian of Rome, Mr. E.S. Shuckburgh, however, says that, while the law permitted the debtor's body to be divided up among the creditors, such a practice was never in fact followed. Whether this is accurate or not may be difficult to ascertain with certainty, but one thing is very clear: that debtors had a bad time, just as they have experienced in much later days in most countries. —*L. T.*, 1940, *p.* 350.

A Witty Chief Justice.—When we mentally try to call up the personality of Edward Law, who, after studying all the mysteries of special pleading in the chambers of George Wood —the future Baron Wood of the Court of Exchequer, and, later, sharing in the defence of Warren Hastings, rose to be Chief Justice of the King's Bench, we naturally think of him as a master of the common law and a judge of the greatest learning which he could expound in a way there was no mistaking, but we are apt to forget that to these great qualities he added a power of sarcastic comment which, however much it delighted the

audience, was by no means quite congenial to those who were its victims. As one writer put it; in dealing out satire upon barristers and witnesses, and even on his judicial compeers, he was not seldom needlessly severe in the perpetration of jests the force of which lay solely in their cruelty. It is said, moreover, that at least on one occasion his satirical comment ruined a young member of the Bar for life. Making his first forensic appearance in Westminster Hall, this novice began thus: "The unfortunate client for whom I appear—hem, hem, I say, my Lord, my unfortunate client—". At this stage of the argument, if so it can be called, the Chief leant forward and, speaking in a soft cooing voice that was all the more derisive because it was so apparently gentle, quietly said, "You may go on, sir; so far, the court is entirely with you". The old writer who preserves this anecdote contrasts this unkindly cut with the very different observation by Mr. Justice Talfourd, who endeared himself not only by his charm on the Bench but by his lifelong devotion to his friend, Charles Lamb, whose life he wrote sympathetically and with great skill and attractiveness. On the occasion in question a nervous member of the Bar was almost overpowered and unable to continue his address, whereupon the judge, appreciating the position, interrupted by quietly saying, "Excuse me, but for a moment I am not at liberty to pay you attention". Thereupon the judge took up a pen and wrote a short note to a friend. Before the judge had finished the young barrister had recovered his self-possession and by an admirable speech secured a verdict for his client. If, instead of appearing before Talfourd, it had been the young man's lot to appear before Lord Ellenborough, his fate would certainly have been sealed. —*L. T.*, 1940, *p.* 364.

"Why I Like the Judge".—Not long ago a twelve year old school girl who had just given evidence before Mr. Justice Stable in the King's Bench Division recorded her impressions under the heading: "Why I like the judge." She wrote: "I like the judge because he explained so I could understand what he said; he was very nice to me, he smiled at me and then I was not afraid of him: he looked nice in his robes and wig, I thought he would have a long wavey wig." I expect Mr. Justice Hawkins made an equally good impression on a small boy whom he once examined to test his fitness to take an oath. "If I were to say you had an orange in your mouth, would that be the truth?" he asked. "No, it would be a lie," said the child. "And if I said you had one in your hand?" "That would be another lie." "And if I promised you a bag of oranges and then didn't give them to you, what would that be?" "That would be a lie." "And if I did give them to you?" "That would be the truth." "Very well, I will." And he did.—*S.J.*, 1940, *p.* 391.

The Child's Mind.—There is a story how the pious and simple-minded Parke, J., once found himself at cross-purposes when examining a little girl in similar circumstances. He asked her a number of questions about the Catechism, the Ten Commandments and the Lord's Prayer, and was very much edified by the accuracy of her answers, which drew from him a series of exclamations of praise. Finally, his thoughts turned to night prayers and he said: "Just tell us, little girl, what you do before going to bed?". To his surprise there was an embarrassed silence. He repeated the question with encouraging expressions, but for a long time could get no answer. At last amid a breathless hush she said confidentally: "I put off my clothes and put on my night cap." The famous Maule, J., had quite a different style for those occasions. "Do you know what an oath is, my child?" he once asked a little girl. "Yes, sir, I am obliged to tell the truth." "And if you always tell the truth, where will you go when you die?" "Up to heaven, sir." "And what will become of you if you tell lies?" "I shall go to the naughty place, sir." "Are you sure of that?" "Yes, sir, quite sure." "Let her be sworn. It is clear she knows a great deal more than I do."—*S.J.*, 1940, *p.* 391.

BOOK REVIEWS.

HINDU LAW by Golap Chandra Sarkar Sastri, 8th Edition, by R. N. Sarkar, M.A., B.L., 980 pages. Published by S. C. Sarkar and Sons, Ltd., 1—1—1 C, College Square, Calcutta. Price Rs. 12.

Sarkar Sastri's Hindu Law has always been regarded as a scholarly treatise on that subject. The present edition of the work by Mr. R. N. Sarkar fully maintains the reputation of its predecessors. The effect of the various pieces of legislation affecting Hindu law has been duly noticed and stated at the appropriate places. The text of such enactments has also been given in the form of an Appendix, thereby adding to the utility of the book. No really important decision has been missed and the citation of cases is full. To agree with some of the views expressed in the book may be difficult, as for instance, with the statement that the widow of a predeceased son would take an absolute estate under the Hindu Women's Rights to Property Act, 1937 (pp. 215, 432). This does not however in any way affect the merit of the work. We are sure that the book will constitute a useful and welcome addition to the library of every lawyer.

PLEADINGS IN INDIA—PRINCIPLES AND PRECEDENTS WITH NOTES by J. P. Agarwala, B.SC., LL.B., 850 pages. Published by S. C. Sarkar and Sons, Ltd., 1—1—1—C, College Square, Calcutta, 1940.

In England, pleadings have long ago become an art and the work of Bullen and Leake constitutes a monumental treatise on that subject. In India so far there is nothing comparable to it

and Mr. Agarwala has now attempted to place before the legal profession a book modelled on similar lines. The first ten chapters deal with matters like Rules of pleading, Alternate and inconsistent pleadings, Particulars, Signing and verification of pleadings, Attacking of opponent's pleadings, Amendment of pleadings, Construction of pleadings, Institution of suits, Parties to suits and Frame of suit. These are followed by as many as 336 forms of plaints each concerned with a different type of suit. The form in which the appropriate defences to such actions should be delivered is also elucidated elaborately. Notes explanatory of the relevant law have been given with each precedent, thereby enhancing the usefulness of the work. The statement of principles in certain places is not quite happy. On p. 121 it is stated: "No company, association or partnership shall consist of more than ten members for the purpose of carrying on the business of banking." What S. 4 of the Indian Companies Act really states is that a company with a larger membership should be registered under the Act if it is to carry on banking business legally and not that the formation of a banking company with a membership of over ten persons is altogether prohibited.

The book is on the whole a useful publication and is bound to afford valuable help to the members of the legal profession.

THE MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938), by M. V. Varadachariar, B.A., Pleader, Chingleput. Published by Arpudha Press, Chingleput, Price Re. 1.

For such a short Act there is now a considerable mass of case-law bearing upon the construction of the different provisions of the Madras Agriculturists' Relief Act, though but two years and a half have elapsed since the measure got into the statute-book. It is therefore inevitable that publications relating to the Act should frequently appear with commentaries noticing the decisions given up to date. In the present book the decisions up to May, 1940, seem to have been collected, though the views expressed in some of them have since then been revised. The rules framed under the Act till the 7th of May have been given as also the texts of a number of allied enactments, such as The Madras Debt Conciliation Act, 1936; The Usurious Loans Act, 1918; The Madras Debtors' Protection Act, 1934 and The Agriculturists' Loans Act, 1884, in the form of appendices.

We have great pleasure in welcoming this publication and we hope that the book will be of service to those for whom it is intended.

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JOTTINGS.

Sir Maurice Gwyer on fee to Juniors.—The statement made by the Chief Justice of India on the 14th October relative to the payment of fee to juniors defines the code of duty to be observed by a Senior Advocate (corresponding to King's Counsel in England) and his junior in the case where the fee payable to the latter bears to the fee payable to the former a proportion less than what the Federal Court Rules require. The rules of the Federal Court embody mainly the practice of the Supreme Court in England. Under those rules a Junior Advocate appearing with a Senior Advocate shall be entitled to a fee not less than one-third and not more than two-third of the fee marked on the brief of the senior, though in England a Junior Counsel will be allowed two-third of the fee of his leader and the taxing officer has no authority to give him less [*Re Park., Bott v. Chester*[1]]. A Senior Advocate may however ask for a 'special fee in addition to the 'brief fee,' provided he had announced that he will not accept any brief or any brief of a specified class without a special fee of a named amount, and where the brief is so marked, the Junior can claim his proper proportion of the ordinary fee only. The practice is to pay the fees marked on the brief at the time of delivering the brief. Marking a fee is at best only an offer of payment and hence Counsel may refuse to accept a brief if the fee is not actually paid. If he does not insist on such prior payment, the payment will become only a matter of honour and not of legal obligation having regard to the dual agency system operating with reference to the Federal Court, as in England, though in some circumstances the non-payment of fees to Counsel by an Agent in possession of his client's funds for that purpose may become a ground for the exercise of the Court's disciplinary jurisdiction.

The statement of Sir Maurice Gwyer deals essentially with the marking of a proper fee for the junior. There are two aspects of the matter, first, where a lower fee is marked on the brief, the junior

1. 1921 W.N. 259.

having agreed to accept the same, and second, where the marking is made in error or by oversight. The case which elicited the pronouncement of the Chief Justice of India on this matter belonged to the latter category but the learned Chief Justice has made it clear that that will make no difference in the result. It is *always* the duty of the junior to refuse to accept a brief not properly marked: it is equally the duty of the Senior Advocate to refuse to go into Court in such a case till a proper fee is marked on the junior's brief and also to bring to the notice of the Court through the Registrar the breach of the rules. Sir Maurice Gwyer has also pointed out that suitable action will be taken against any Agent who refuses to pay the proper fee or obtains a receipt for a fee not in fact paid. He has further declared that before a case is heard the fees should have been *legibly* marked on the brief and that the backsheets of the briefs so marked with Counsel's receipt upon it for the fees should be produced on taxation to the taxing master.

To what extent the principles postulated by the Chief Justice of India will be applicable and can be applied to the members of the Bar in the High Court and in the mofussil is a matter not susceptible of an easy solution. There is no recognised division of the Bar here into senior advocates and junior advocates; nor is there any rule rendering it obligatory on any particular class of advocates to appear always with a junior. One of the rules of professional etiquette formulated by our Bar Council no doubt lays down that "in every case in which an advocate of over ten years' standing receives a fee of not less than Rs. 500/, he is expected to be instructed by a junior advocate, pleader, or solicitor"; but even if strictly observed the rule will not be of much help to juniors. Cases where an advocate is paid more than Rs. 500/- will not be considerable, but that apart, the rule does not prescribe the proportion which the junior's fee shall bear to that of the senior normally. Mr. Justice Sundara Aiyar's suggestion in his Lectures on Professional Ethics that the fixing of the proportion will not result in any real advantage to the junior rests mainly on an apprehension that the client may not care to engage a junior at all or that he may go in for the services of the seniormost among the juniors rather than engage two advocates. The apprehension now stands considerably dispelled in consequence of the rule enunciated by the Bar Council that a senior should be instructed by a junior advocate under certain circumstances. The other reason mentioned by Mr. Justice Sundara Aiyar will affect the position in a comparatively small degree only, for it is doubtful whether a client will prefer to be without the services of a senior with an acknowledged reputation and go in for a junior of some standing merely because the senior insists on being instructed by a junior. It is however

gratifying to note that though the code of duty propounded by Sir Maurice Gwyer was directed to the members of the Federal Bar, it was accepted and acted upon, the moment he read the statement, by a leading member of our own Bar, by making the client agree to pay his junior in the case the fee which would be proper according to the standards laid down by the Chief Justice of India.

Tenure of Office of High Court Judges.—Anent the announcement extending the term of office of Mr. Justice Venkataramana Rao, it may be interesting to recall the changes that have been progressively made in the rules relating to the tenure of High Court Judges in India. Originally all Judges held office during pleasure of the Crown and there was no prescribed age limit for their retirement. The English practice of those days permitting a Judge to continue in office till he himself felt that he should retire was evidently followed in India. Sir George Knox and Sir P.C. Banerjee among others constitute illustrious instances of Judges who continued on the Bench for a long time after passing their three score years with unimpaired vigour and unabated reputation. Sir George Knox's record was absolutely unique in the annals of public service in India. He was a Judge of the High Court for more than 30 years and remarkably enough, if the report be true, had availed himself of only a day's leave throughout his service, that day being his wedding day. Sir P. C. Banerjee also continued on the Bench for well nigh 30 years, retiring in his 75th year. In England there was the outstanding example afforded by Lord Macnaghten, some of whose scintillating judgments were delivered at the Privy Council after he had attained his 80th year, and in recent times there was the case of Mr. Justice Avory who continued on the Bench even after passing his 83rd year. These can however be regarded only as remarkable exceptions. For the first time by his Despatch of the 27th April 1899—No. 18 Judicial, the Secretary of State for India in Council intimated to the Government of India that it had been decided that every Chief Justice or Judge appointed to a High Court in India will be called upon to resign his office on attaining the sixtieth year, that notice to this effect should be given to a Judge at the time of appointment and that his acceptance of the condition was to be obtained and duly recorded. The Government of India was also informed that no relaxation of the rule would be practicable. Even after the Government of India Act, 1915, no statutory age limit existed but such a limit was in practice enforced by taking an undertaking from the Judges at the time of their appointment to retire on attainment of the sixtieth year. In certain cases however Government has been pleased for special reasons to continue in office Judges who shall have otherwise to retire in accordance with such undertaking. In our own High Court Mr. Justice Bhashyam Iyengar formerly,

Mr. Justice Seshagiri Aiyar in 1920 and now Mr. Justice Venkataramana Rao had such extensions granted. It has sometimes been suggested that the prospect of an extension of the tenure of Judges at the choice of Government might react on the complete independence of the judiciary from the executive. At the same time it may be noted that a compulsory retirement of Judges on their completing sixty years will sometimes result in the services of Judges possessing talents and judicial qualities of an outstanding character being altogether lost. In the case of Judges of the Federal Court the age-limit is fixed at 65 and there can be no justification for the imposition of a different limit for the High Court unless it be that the work of the Federal Court is not expected to be so taxing as work on the Bench of the High Courts. In England there is always the possibility of the services of distinguished judges being utilised even after retirement by their being appointed to the Judicial Committee or being elevated to the peerage whereby they would become eligible to participate in the judicial business of the House of Lords. In India the tenure of Judges of the High Court falls to be governed now by S. 220 of the Government of India Act, 1935. The Judges hold office during good behaviour and can serve till they attain 60 years. Extension of term can lend itself to criticism only where it is courted but not where it results from an appreciation of the judicial qualities of a judge. The limit though negative being however statutory, no question of extension of the term of office of a judge will receive favourable consideration where the appointment has been made after the coming into operation of the Government of India Act, 1935. In the case of Judges appointed before the commencement of Part III of the Act, though they shall be deemed to be appointed under that Part, yet their term of office will not be affected by the Act [S. 231]. And if the proposals relating to the expansion of the powers and jurisdiction of the Federal Court materialise it may well be that a certain portion of the personnel of the Federal Bench will be recruited from judges of the High Courts having distinguished records of service, and in that manner the services of such Judges from the Bench will continue to be available till they attain 65 years.

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A NOTE ON MUHAMMAD SAHIB *V.* KUNTHANMAL SOWCAR, (1940) 2 M.L.J. 185*

BY

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Mr. Justice Horwill has laid down in this case dealing with a debt incurred subsequent to 1932, that S. 12 of the Madras Agriculturists' Relief Act (IV of 1938) entitled a creditor to interest on any sum remaining outstanding after the debt had been scaled down, from the date up to which it is scaled down, that is, *only from the date of the decree* and that the past interest having been paid off in full long before the Act came into force the plaintiff was entitled to a decree only for the balance of the principal outstanding.

The judgment does not indicate the rate of interest specified in the promissory note which was of the year 1933 and whether any payment was made towards interest in October of that year when the debtor paid Rs. 100 for principal out of the Rs. 300 for which the note was originally executed. Presumably it was, for no creditor will ordinarily allow any payment for principal without the interest till then due being paid. It may also be assumed that when the interest was paid in full on 18-11-35, it was paid according to the promissory note rate. The plaintiff in the suit had claimed interest from 22-3-38 up to the date of suit. No interest on Rs. 200 seems to have been claimed from 18-11-35 up to the date of suit. Evidently the interest paid on 18-11-35 very nearly equalled or exceeded the amount of interest calculated on the 5 per cent. basis from the date of the bond up to 22-3-38, for in that case alone will there be no

* In C.R.P. 1756 of 1939, (1940) 2 M.L.J. (N.R.C.), p. 28, it has been held that in cases under S. 8 interest should be calculated on the amount scaled down, not from the date of the decree scaling down but from 1—10—1937 at the rate mentioned in S. 12 ; in a case falling under S. 9, the decision in (1940) 2 M.L.J. 758 suggests that the starting point for interest on the amount scaled down will be 22—3—1938.—*Ed.*

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interest outstanding on the 5 per cent. basis on 22-3-38. The Rs. 7-8-0 claimed for interest up to the date of suit should have been calculated on the $6\frac{1}{4}$ per cent. basis on Rs. 200 from 22-3-38 up to the date of suit. His Lordship equates the date up to which the debt is scaled down with the date of the decree, and holds that from that date that amount carries future interest under S. 12 of the Act. With due respect to his Lordship this does not appear to be the correct interpretation of S. 12. A distinction should be drawn between the time of scaling down and the date up to which the debts are scaled down as contemplated in S. 12. It is true that debts are scaled down under Ss. 8 and 9 so far as the principal and interest are concerned with a view to fix the legal liability under the statute intended to benefit the agriculturists coming within its scope. Under S. 8 the scaling down of interest takes place up to 1-10-37 in that it wipes off the interest outstanding altogether. The principal outstanding on that date carries subsequent interest at 6 per cent. from that date up to the date of payment. No question of the decree affording any starting point for payment of future interest can possibly arise. S. 8, sub-S. (2) provides for a case of wiping off the liability altogether. Sub-S. (3) provides alone for the payment of the amount that would make up the shortage between sums repaid by way of principal or interest and twice the amount of the principal. It may be that the principle of discharge by double payment or approximating to double payment can be applied even taking into consideration any payments made after 1-10-37 and even after 22-3-38. There has however been no decided case so far on this point.

The Act came into force on 22-3-38. The crucial dates mentioned in S. 8 are 1-10-32 and 1-10-37, the former with reference to the starting of the indebtedness and the latter with reference to the ascertainment of the amount repayable on that date, as mentioned in sub-S. (1) thereto. S. 12 refers to future interest on the debt that is scaled down in cases where the debt was incurred prior to the Act and S. 13 refers to those that are incurred subsequent to the Act. The application of S. 12 presents no difficulty. If Mr. Justice Horwill's interpretation is correct, a new date is introduced as the date up to which the debt is scaled down, *viz., the date of the decree.* Suppose the parties do not go to court but try out of court to settle the amount due under the Act, then according to the learned Judge that would be the date up to which the debt is scaled down for the purpose of carrying future interest if the settled amount is not paid. 1-10-37 and 22-3-38 will not be according to his Lordship the respective dates up to which the debt is scaled down according as S. 8 or S. 9 is applicable to the facts of the case. The correct interpretation will be that the words "from the date up to

which it is scaled down" in S. 12 mean one or the other of the dates mentioned above, no matter when, after the commencement of the Act, the parties try to settle accounts out of court or through court. According to his Lordship's view the principal outstanding on 1-10-37 will carry no interest whatever; likewise, the principal outstanding on 22-3-38. This view will render S. 12 absolutely nugatory. In trying to interpret S. 12 his Lordship has virtually ignored its operation in respect of interest subsequent to the two dates implicit in the section. Post decree interest is provided for in the Civil Procedure Code at 6 per cent. S. 12 of the Act was not intended to provide for this. It was only intended to provide for interest after scaling down for, otherwise any delay on the part of the creditor to resort to court will result in his not getting any interest for the interval between 1-10-37 or 22-3-38, as the case may be, and the date of suit and this could hardly have been intended in an expropriatory legislation of this kind which must be interpreted strictly.

SUMMARY OF ENGLISH CASES.

NOBLE *v.* SOUTHERN RAILWAY CO., (1940) A.C. 583 (H.L.).

Workmen's Compensation Act (1925), S. 1 (2)—Death of Railway employee caused while walking along the railway line which was forbidden—Accident if arising out of and in the course of employment.

A fireman was employed on piloting duties, *i.e.*, if a driver was not acquainted with the railroad, he had to travel in the engine cab and show it to him. A safe route from the depot to the station was provided and walking along the railway line was prohibited. The fireman while walking along the forbidden route to an engine was knocked down and killed by an electric train. In a claim by his widow for compensation,

Held, reversing the decision of the Court of Appeal in (1939) 2 All.E.R. 817, that though the accident did not arise out of the employment but occurred while the deceased was contravening the regulations as to his proper route from the engine house to the station, still as the workman was walking along the line for the purpose of and in connection with his employers' trade or business the accident must be deemed to arise out of and in the course of the employment and his widow would be entitled to compensation.

Clarke v. *Southern Railway Co.*, 96 L.J.K.B. 572, overruled.

KNIGHTSBRIDGE ESTATES TRUST, LTD. *v.* BYRNE, (1940) A.C. 613.

Trade Marks Act (1939)—Redemption—Provision for redemption in eighty half-yearly instalments—If clog on equity of redemption—If offends rule against perpetuities.

The respondents, the owners of a large freehold estate owed on a mortgage dated 6th May, 1927, carrying interest at 6¼ per cent. per annum, 3,00,000*l*. to a certain company. In January, 1931, the appellant society agreed to grant to the respondents a loan of 3,10,000 at 5¼ per cent. interest per annum repayable over a period of forty years by half-yearly instalments, the whole money to become payable on any default. On 6th November, 1931, a mortgage embodying the agreement was executed in favour of the appellants. On 25th February, 1937, the respondents issued a writ claiming to be entitled to redeem the mortgaged property on the usual notice notwithstanding the provision for repayment by eighty instalments spread over forty years claiming that the condition was illegal and void as a clog on the right to redeem and not capable of being enforced.

Held [affirming the decision of the Court of Appeal in (1939) 1 Ch. 441]: (1) The mortgage was a debenture within the meaning of S. 74 of the Companies Act, 1929; (2) the rule against perpetuities did not apply to mortgages; and (3) the terms of the mortgage were not so stringent or oppressive as to justify interference of the Court.

COHEN *v.* COHEN, (1940) A.C. 631 (H.L.).

Divorce—Desertion—Presentation and service upon deserting spouse of petition for dissolution of marriage—Effect on period of desertion.

In so far as it lays down a general principle applicable to all cases in which a deserted spouse presents a petition for divorce or judicial separation, that filing a petition for judicial separation puts an end to desertion, the decision in *Stevenson* v. *Stevenson*, (1911) P. 191 is unacceptable and should be overruled. The question whether a deserting spouse has reasonable cause for not trying to bring the desertion to an end, and the corresponding question whether desertion without cause has existed for the necessary period must depend on the circumstances of the particular case.

(1939) 2 All.E.R. 596, reversed.

LOWRY *v.* CONSOLIDATED AFRICAN SELECTION TRUST, LTD., (1940) A.C. 648 (H.L.).

Income-tax—Company—Shares issued to employees at par as remuneration for services—Premium which the shares would have brought to the company if issued to public—If deductible against profits.

A company by special resolutions increased its share capital by the creation of certain redeemable preference shares and 400,000 new ordinary shares of 5*s*. each and 10,000 of such shares were reserved for issue to the employees of the company. 6,000 of those shares

were allotted to the employees at par, as remuneration for services rendered. If issued to the public the shares would have fetched a premium of £1-18-9 per share. In a claim to deduct such premium against profits, for income-tax purposes,

Held [reversing (1939) 1 All.E.R. 353 (C.A.), *Lord Wright and Lord Romer*, dissenting].—Issuing shares is not a trading transaction and does not in any way affect the gains and profits of the company and hence the company is not entitled to the deduction claimed.

SOUTHERN FOUNDRIES (1926), LTD. *v.* SHIRLAW, (1940) A.C. 701 (H.L.).

Company—Contract of employment of managing director for 10 years—Alteration of articles giving power to remove director—Exercise of power—Liability of company for breach of implied term.

The S. F. Company agreed by a contract of 21st December, 1933, to employ the plaintiff as managing director (of which he was to be a director also) for ten years and the company could not remove him under its articles of association. In April, 1936, the company altered its articles giving power to F. F. Ltd. (who had acquired financial control of S. F. Co.) to remove any director of S. F. Company and also providing that the appointment of any person as managing director should determine if he ceased from any cause to be a director. On 25th March, 1937, F. F. Ltd. exercised the power to remove plaintiff from being a director of S. F. and *ipso facto* his managing directorship ceased. In a claim for damages for breach of contract,

Held [affirming (1939) 2 All.E.R. 113 (C.A.), *Viscount Maugham and Lord Romer*, dissenting].—Though the alteration of the articles was not in itself a breach of contract, the exercise of the power by F. F. Ltd. caused the breach of contract by S. F. company and the defendants were liable for damages.

NICHOLAS *v.* COMMISSIONER OF TAXES, STATE OF VICTORIA, (1940) A.C. 744 (P.C.).

Income-tax—Bonus shares issued out of accumulated undistributed profits of company—Value of shares to be included in taxable income of shareholder.

Where fully paid bonus shares are issued out of the accumulated undistributed profits of a company, the value of such shares should be included in the assessment of taxable income of the shareholder.

LIQUIDATOR, RHODESIA METALS, LTD. *v.* COMMISSIONER OF TAXES, (1940) A.C. 774 (P.C.).

Income-tax—Mining claims in Africa acquired by English company for development and sale—Sale of undertaking in England at profit—Capital appreciation—Liability to assessment in Africa as receipt within that territory.

The appellant company was incorporated on 30th November, 1935, as a private company with a nominal capital of £10,000. On the same day another company Swithin Ores and Metals was incorporated with a capital of £100,000. One *E* was a large shareholder and chairman of both the companies. On 5th December, 1935, E who was entitled to a number of mining claims in Southern Rhodesia sold some of them for £37,500 and on 12th December, 1935, sold certain others to the appellant company for £ 5,000 cash. On 20th January, 1936, Swithins increased its capital to £200,000. On 27th January, 1936, by special resolution the appellant company was voluntarily wound up and *W* was appointed liquidator. On 15th March, 1936, the whole undertaking of the appellant company was sold to Swithins for £152,000 payable as to £150,000 in fully paid shares and as to £2,000 in cash. All the purchases and sales were in England.

Held, on the evidence that this was the culminating step in a scheme designed when the claims were bought and was made for the purpose of concluding the operation of profit making which was on hand when the liquidation was commenced. The appellant company received the profits from a source within African territory (namely the mining claims which they had acquired and developed there for the very purpose of obtaining the particular receipt), and the receipt was therefore liable to assessment in Rhodesia.

United Steel Companies, Ltd. *v.* Cullington, (1940) A.C. 812 (H.L.).

Income-tax—Finance Act (1926), Ss. 32 and 33—Amalgamated company—If entitled to deductions in respect of losses and wear and tear to machinery to which the old companies which were amalgamated were entitled to.

Two companies *A* and *B* were amalgamated into a new company in 1930. *A* and *B* companies continually showed losses for which they were unable to obtain relief under Income-tax Act, 1918, S. 34. *B* company was further unable to give effect to the deductions for wear and tear to machinery which it was entitled to. In respect of the deductions thus carried forward by the two old companies relief was now claimed by the amalgamated company,

Held, the new company cannot claim the right to deductions in respect of the losses and wear and tear of the old companies. (1939) 1 K.B. 644; (1939) 1 All.E.R. 454 (C.A.), affirmed.

Bismag, Ltd. *v.* Amblins (Chemists), Ltd., (1940) 1 Ch. 667 (C.A.).

Trade Marks Act (1939), S. 44—Use by defendant of plaintiff's trade mark in relation to plaintiff's own goods—If infringement.

Plaintiffs had registered "bisurated," as trade mark in respect of (1) their patent medicines and (2) chemical substances for use in pharmacy. Defendants carrying on business of manufacture and sale of medicinal preparations issued pamphlets showing the exorbitant cost of patent medicines and their analysis and offering the same prescription at much less cost.

Held [*MacKinnon, L.J.*, dissenting, reversing (1940) 1 All.E.R. 156]. —There was an infringement of the registered trade mark of the plaintiffs.

ESTATE OF THOMAS MILWARD, *In re*, (1940) 1 Ch. 698.

Will—Construction—Gift over on death of devisee leaving no "child or children"—To be construed as meaning "issue" when necessary.

Where there is a provision in a will for a gift over on the death of the devisee leaving no "child or children" as a matter of construction it is open to the Court if it thinks fit to do so to give a wider meaning to the expression "child or children" as meaning "issue" if the words were intended to have the wider meaning.

BARING'S SETTLEMENT TRUSTS, *In re*: BARING BROTHERS & CO. *v.* LIDDELL, (1940) 1 Ch. 737.

Settlement—Forfeiture—Provision for determination of life interest, if income "becomes payable to other person"—Writ of sequestration—Effect on provision.

A forfeiture clause in a settlement deed provided that in the event of a certain income becoming vested in or payable to another person a life estate was to determine. On the issue of a notice of writ of sequestration to the person entitled to the life interest,

Held, that it resulted in a forfeiture.

HENDERSON, *In re*: HENDERSON *v.* HENDERSON, (1940) 1 Ch. 764.

Will—Trustees under will—Friction between—Jurisdiction of Court to appoint new trustees against will of existing trustees—Trusts Act (1925), S. 41 (1).

Under Trusts Act (1925), S. 41 (1) a Court has jurisdiction in a proper case to appoint a new trustee against the will of an existing trustee. Accordingly where there is friction (not due to dispute as to facts) between the two trustees under a will the Court is entitled to appoint a new trustee.

DIGBY *v.* GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., (1940) 2 K.B. 226.

Insurance—Motor insurance—Indemnity against third party risks of policyholder with a similar indemnity to authorised driver—Claim of policyholder against his driver—Rights of driver to indemnity under policy—Arbitration clause—If binding on driver.

An insurance company (by the policy containing a section with marginal heading "Third party liability") undertook to indemnify the policyholder in respect of any claim by any person including passengers in the car against all risks through or in respect of his car. The indemnity was to extend to any person driving the car with the owner's order or permission. The owner having been injured in a collision and failing in his claim against the owner of the other car sued his own chauffeur for damages, who in turn claimed indemnity under the policy of insurance.

Held, (1) the chauffeur was bound by the arbitration clause in the policy. (2) (*Luxmoore, J.,* dissenting).—The authorised driver or person driving with the consent of the policyholder could not claim indemnity in respect of his liability to the policyholder who was injured by the driving of the car, and the insured is not a "Third party." (1940) 1 All.E.R. 514, varied.

CHANDLER *v.* EMERTON AND OTHERS, JUSTICES, (1940) 2 K.B. 261.

Licence for sale of liquors—"Occasional licence"—Application regularly for licence for 3 days in a week in a particular month every year—If ceases to be "occasional."

Applications were made regularly year after year by the applicant for "occasional licence" to sell intoxicating liquors on Tuesdays, Thursdays and Saturdays in the month of June when dances were to be held in the premises. The Justices held that the word "occasional" was a complete bar to the grant of such licences. On appeal,

Held, the word "occasional" does not constitute a complete bar to the grant of applications merely because they are made regularly.

GRIFFITHS *v.* DALTON, (1940) 2 K.B. 264.

Banking—Undated cheque—Right to fill in date—When to be exercised.

An undated cheque is not an instrument which the banker on whom it is drawn is bound to honour. But a person in possession of such a cheque must exercise his *prima facie* authority to fill in the date within a reasonable time. The question what is a reasonable time is a question of fact.

SOTHERN-SMITH *v.* CLANCY, (1940) 2 K.B. 276.

Income-tax—Insurance providing for annual payments in consideration of a single premium—Annual payments whether income or capital.

Under a contract called a "refund annuity" an insurance society in consideration of the payment by the annuitant of $65,243.22 (as capital invested) agreed to pay an annuity of $6510 annually during his lifetime. It was further guaranteed that the aggregate payments should not in any event amount to less than the amount of the capital invested.

Held, that the annual payments were capital and not income for purposes of income-tax.

JOPLING *v.* INLAND REVENUE COMMISSIONERS, (1940) 2 K.B. 282.

Stamps—Instrument of transfer of certain shares appropriated by the execution of a will in satisfaction of a legacy—Whether to be stamped as "conveyance or transfer on sale."

An instrument of transfer of certain shares appropriated by the execution of a will in satisfaction of a legacy left thereby to the transferee is chargeable with stamp duty as a conveyance or transfer on sale. The substance of the matter is that the executor proposes an appropriation, and the legatee consents to it, and by so consenting the legatee discharges the executor from his obligation to pay the legacy in money. It therefore amounts to a conveyance on sale.

KNEESHAW *v.* ABERTOLLI, (1940) 2 K.B. 295.

Income-tax—Payment for obtaining licence for monopoly of selling beer and wine—If deductible from profits for assessment.

A licence was granted to the assessee for three years for sale of beer and wine and the amount which was settled as the monopoly value was £75 payable in three annual instalments.

Held, this sum was a capital sum, and the fact that it was payable in instalments did not prevent those instalments from being capital for revenue purposes and the sum cannot be allowed as a deduction against the assessment in each year.

MILLS *v.* STANWAY COACHES, LTD., (1940) 2 K.B. 334.

Tort—Negligence—Damages for loss of expectation of life and for pain and suffering—Quantum.

The plaintiff's wife aged 34 and in good health was fatally injured in a motor accident and after being unconscious for 4 days died. In a claim for damages by the husband under the Fatal Accidents Act,

Held, that damages for loss of expectation of life should be moderate and ought not to exceed £1,000 in the case of adults.

FORSYTH *v.* THOMPSON, (1940) 2 K.B. 366.

Income-tax—Mutual society providing its members (who have to pay premiums) with weekly payments in the event of sickness—Amounts received by member—Liability to tax.

Sums payable by a mutual society to its members under their individual contracts with the mutual society are to be considered on the same basis as similar contracts with a proprietary company. If they result in annual payment or payments of annuities the recipients are taxable in respect of those annual payments or annuities. The fact of such payments or annuities being contingent on continuance of payment of premiums to the society will not prevent the sums from being annual payments.

ANDREWS *v.* ANDREWS, (1940) P. 184.

Divorce—Decree nisi*—Petitioner's adultery before petition not disclosed—Intervention—Discretion of Court—Public policy.*

A husband obtained a decree *nisi* on the ground of desertion without disclosing his own adulterous association with another woman through whom he had children. On the King's Proctor intervening,

Held, though the petitioner's conduct in deliberately deceiving the Court was most reprehensible and public policy demanded that such deception should be discouraged, whether the decree should be rescinded and the petition dismissed must depend on the circumstances of the individual case. The prospect of the association with the woman leading to a happy married home should not be frustrated and in this case the public policy was in favour of allowing the decree to stand and the discretion of the Court should be exercised accordingly.

HORTON *v.* HORTON, (1940) P. 187.

Divorce—Wife's legal cruelty—What constitutes.

The charge against the wife was one of perpetual nagging, and hurling accusations against the husband of associating with other women, complaints about his absence from home on Masonic business, charges of hypocrisy about his religion and so on. This course of conduct was carried on at night. The medical evidence showed that the husband's health was affected by this and when he stayed away from the wife his health improved. Also in addition to small acts of violence to the husband, the wife out of jealous spite,

from time to time, damaged various things (such as masonic clothing, hats, gold cigarette case, presentation silver salver and the lens of his spectacles) which all disclosed malevolence likely to bear fruit in acts of cruelty. On the evidence,

Held, there was legal cruelty entitling the husband to a decree for divorce.

JOTTINGS AND CUTTINGS.

In re Witnesses.—Countless are the stories that have been handed down from generation to generation regarding witnesses, their idiosyncracies in their mode of giving evidence, their endeavours to elude the little traps laid for them by the skilful cross-examiner, who has so often the witness at a disadvantage. Occasionally, it is true, the witness scores in the skirmish that takes place, but more often, unless he chances to be very astute, he is at a disadvantage. Some cynical person of a past generation, it will be remembered, classified witnesses into three catagories, witnesses *simpliciter*, blank witnesses, and experts. But this is, perhaps, too strong a way of putting it.—*L.T.*, *1940*, *p.* 32.

Jeffreys and the Witness.—It is traditionally reported that in the reign of Charles II. in badgering a witness, no barrister could surpass George Jeffreys, of sanguinary fame. Nevertheless, on more than one occasion he met his match in the witness-box. "You fellow in the leathern doubtlet," he is reported to have said to a countryman whom he was about to cross-examine, "pray, what are you paid for swearing?" "God bless you, sir," was the reply, "and make you an honest man," answered the witness, looking counsel full in the face and speaking with a voice of hearty good-humour, "if you had no more for lying than I have for swearing, you would wear a leathern doublet as well as I."—*L.T.*, *1940*, *p.* 32.

Erskine's Methods.—It is said that Erskine's treatment of witnesses was sometimes unfair, but his jocoseness was generally distinct from mere flippancy and his unfairness was redeemed by such delicacy of wit that his most cutting observations seldom annoyed the witness. A story has come down which tells us that a religious enthusiast, on entering the witness-box, objected to take the oath in the customary manner, but stated that though he would not kiss the book he was quite ready to hold up his hand and swear. On being asked by Erskine to give his reason for this departure from the usual mode of testifying in the courts, he answered that "it is written in the Book of Revelation that the angel standing on the sea held up his hand."

"But that," interjected Erskine, "cannot apply to your case, for in the first place you are no angel, secondly, you cannot tell how the angel would have sworn if he had stood on dry land as you do." The witness declined to budge from the position he had taken up and was permitted to give his testimony in his own way, and so impressed apparently was the jury by his evidence that they found a verdict adverse to Erskine's client. Erskine might have remembered, but for the moment he chose to forget, that in Scotland, his native country, the method of taking the oath is for the witness to hold up his right hand and repeat the words after the judge. Erskine was usually very happy in his sayings; one that has often been recalled, but which will bear repetition, is the opinion which he gave on a case laid before him by his friend, the Duke of Queensberry, popularly known as "Old Q," as to whether he could sue a certain tradesman for breach of contract about the painting of his house. The evidence available being in the view of Erskine totally insufficient to support the case, he wrote, "I am of opinion that this action will not lie, unless the witnesses lie too!" Not a few jokes that come down to us have a fairly long pedigree, and so it is in this case, for, as someone pointed out, the story is apparently a revival of the pun attributed to Lord Chancellor Hatton in Bacon's Apopthegmes.—*L.T., 1940, p. 32.*

Clergymen as witnesses.—The late Mr. Balfour Browne, K.C., who specialised at the Parliamentary Bar, in his work, Forty Years at the Bar, expressed the view that clergymen do not, as a rule, make good witnesses. Having been used to an autocratic pulpit, he said, they did not take kindly to the chair where the bladders of their pomposity—his own word—might be pricked by a sharp question. But despite this general view he had known both clergymen of the Church of England and of Rome to give excellent straightforward evidence. Quakers, as Lamb recalled in one of his essays, have always been remarkable for their self-watchfulness, a quality which never gave way to the winds of persecution or to the violence of judge or accuser under trials and racking examinations. "You will never be the wiser, if I sit here answering your questions till midnight," said one of the Friends. "Thereafter, as the answer may be," retorted his examiner.—*L.T., 1940, p. 33.*

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JOTTINGS AND CUTTINGS.

Retirement of Mr. Appa Rao.—It has been announced that Rao Bahadur D. Appa Rao, the Registrar of our High Court is proceeding on leave for 28 months from 1st December preparatory to retirement. Born in January, 1889, Mr. Appa Rao entered service in 1923 as Junior Law Reporter and was appointed Assistant Registrar, Appellate Side in 1926. Thereafter he held successively the posts of Official Referee, Deputy Registrar, Master and Registrar. He was also for some time on special duty in connection with the reorganisation of the Official Assignee's department. When Mr. Appa Rao was confirmed as Registrar in 1938 he had the distinction of being the first Indian and the first from among the members of the Bar to be appointed to that place in the Madras High Court. Quiet and reserved by temperament, Mr. Appa Rao was always kind and courteous towards the members of the Bar. He could appreciate their difficulties and view their grievances with sympathy. We wish Mr. Appa Rao all happiness in his retirement.

Our New Registrar.—Mr. S. P. Thompson, I.C.S., the incoming Registrar of the High Court is 38 years old and was confirmed as District and Sessions Judge in February last, after having served in that capacity in Ramnad, West Tanjore and Madura Districts for a period of nearly four years. Mr. Thompson is an University man being an Honours Graduate of the Cambridge University. This seems to be the first time when a permanent District Judge is appointed Registrar of the High Court in our province. We trust that the principle underlying the appointment is that the Registrar of the High Court should be a person who has already been in day to day contact with the members of the bar and conversant with their problems and needs. We hope that during his tenure of office as Registrar, the members of the bar will continue to be accorded by Mr. Thompson the same courtesy, sympathy and accommodation which had been extended to them by his predecessor. We should have been glad if the Registrar was always to be chosen from the ranks of the Bar, but surely the next best thing will be to have a

person who has been in active touch with the Bar and has also had judicial experience for a number of years.

Legal Profession and Legal Education.—Sir Lionel Leach took advantage of the opportunity afforded to deliver the convocation address at Annamalainagar to speak about the legal profession. His speech is of more than passing interest to the members of the Bar. It attempts an analysis of problems like overcrowding at the Bar and suggests some remedial measures. Overcrowding in the legal profession is by no means peculiar to our country, but the acuteness of the problem here may be gauged by the fact that there are at present more than 8,500 legal practitioners of various classes and grades in this presidency alone of whom very many are not in a position to earn their livelihood and—in the words of the learned Chief Justice —" never will be", and this number is being reinforced annually at the rate of about 200 members by fresh enrolments. How wastage of much of such talent could be avoided is thus a question which demands an effective and quick solution. The learned Chief Justice points out that suggestions like the closing down of the Law College or regulating admission thereto or stopping of fresh enrolments or restricting the same, far from affording a solution to the problem will only give rise to fresh difficulties.

In considering the matter, we are glad to note that the learned Chief Justice approches the question with an expression of belief in the efficacy of the single agency system as best suited to the Indian temperament and as minimising the costs of litigation considerably without any real loss of efficiency in general. According to him the first step therefore to a better state of affairs is to improve the system of legal education so as to provide for the curative as well as the preventive side of law, by affording instruction not merely in subjects constituting the equipment of a forensic practitioner but also in subjects concerned with the solicitor's side of the profession, such as conveyancing, company law, etc. This has to be achieved not by cutting down part of the present curricula of law studies but by providing for supplementary instruction in such subjects, whether as part of the law course at the Law College or outside it under the auspices of the Bar Council. Such a training if afforded may at the choice of a law student enable him to decide even at the outset what branch of an advocate's work he would like to specialise in, whether he would like to equip himself for a forensic career or for the less obtrusive but equally important and probably more remunerative side of the profession, namely, conveyancing and drafting, which in view of the increasing industrial and commercial activities of the country might come into increasing prominence in the future. Sir Lionel Leach is not in favour of divorcing legal education in the

practitioner's sense from the University but would suggest a full co-operation between the Bar Council and the University in all matters of legal education. This view derives considerable support from the Report of the Legal Education Committee appointed in England by the Lord Chancellor in 1932.

Another step suggested by the learned Chief Justice to make the profession healthier is that the profession must ensure that the high standard of professional conduct that is demanded should be maintained throughout the profession. If the suggestion of the Chief Justice is that we should always strive to keep aloft the high ideals of the profession it would be unexceptionable. If the suggestion however is that the present position requires improvement then we should like to have fuller information. We are under the impression, —to quote a recent writer—that it is a matter for congratulation that "with such large numbers at the Bar, with such varied activities in which he is called upon to take responsible part, and with such opportunities and temptations to misconduct himself, he has not fallen from 'his high estate' with any frequency". It may be noted that during 1934-1939, with the strength of the Advocate Bar ranging from 2712 to 3729 there were only 6 cases where practitioners were found culpable and punished.

The learned Chief Justice has also stressed the necessity for the maintenance of regular accounts by advocates and the keeping of their clients' money entirely separate from their own. The Instructions to the members of the Bar issued by the Bar Council are to the same effect. We should like to suggest that greater publicity should be given to such rules and instructions by the Bar Council providing each advocate with a copy thereof. New entrants to the profession might be given a copy of such rules at the time of their enrolment.

Another interesting suggestion made by the learned Chief Justice is that advocates should form themselves into partnerships in which some of the partners will be persons conducting cases in Court while others would concern themselves with work akin to that done by solicitors. It is not to be a partnership put on a commercial basis but one "where an advocate puts nothing in when he joins it and takes nothing out when he leaves it." Such a partnership will be able to cope with all types of legal work and find place for men of talents.

The learned Chief Justice also indicates the desirability of the Bar being divided into seniors and juniors with a definition of the work which should be left ordinarily to juniors only. Taken along with Sir Maurice Gwyer's statement some time back on payment of fees to junior advocates, it is hoped that this suggestion will be considered by the Bar Council and appropriate principles formulated.

The Chancellor's Pension.—Somebody recently saw fit to ask the Chancellor of the Exchequer, among the Parliamentary flourishes of question time, whether in the interests of economy he proposed to repeal 2 and 3 Will. IV, c. 3. Until the dawn of that salutary time when those who serve the nation in public business (whether as M. P.'s or in some more responsible capacity) do so gratuitously and without any thought of present or future reward there seems little reason why the great office of the Lord Chancellor should be shorn of any more of its emoluments. The Act in question, which secures to the occupant of the Woolsack an annuity of £5,000 after he vacates it, was itself considered to effect a grave diminution in the desirability of that seat. Till then he had revelled in patronage, and the sinecures at his disposal had enabled him to provide handsomely for his descendants by means of those which he did not retain for himself. In all they were worth about £24,000 a year, and their duties could very conveniently be handed over to a deputy.—*S.J., 1940, p. 439.*

The United States President.—In view of the acceptance by Mr. Roosevelt of nomination for a third term as President of the United States—a step unprecedented in the history of the nation—it may be of interest to remind ourselves of the precise relationship of the presidential office to the Legislature and the Judiciary. With regard to legislation, it is required that every Bill, when passed by the House of Representatives and the Senate shall, before it becomes law, be presented to the President. If he approves, he signs it and thereupon it becomes law, but if perchance he disapproves, he may return it with his objections for further consideration. If, however, it is again approved by a two-thirds majority it becomes law notwithstanding the views of the President. With regard to the Judiciary, the Constitution has devolved upon the President the function of the nomination, and, with the advice and consent of the Senate, the appointment, of the judges of the Supreme Court. When the organisation of that great tribunal was settled the interesting question arose regarding the constume of the judges. Should they wear gowns and wigs like their English confreres? Hamilton was in favour of the English wig and gown. Jefferson was against any needless official apparel, but if the gown was to be adopted, he added, "For Heaven's sake discard the monstrous wig which makes the English judges look like rats peeping through bunches of oakum." Burr was also opposed to the "inverted woolsack termed a wig." Eventually, the gown was adopted and the wig discarded. In its history the Supreme Court has had many notable judges, among these being John Marshall, of whom the late Lord Bryce said that he rendered such incomparable services in the office that the Americans have been wont to regard him as a special gift of favouring Providence.—*S.J., 1940, p. 445.*

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NOTES OF RECENT CASES.

Horwill, J.
17th April, 1940.

Jagannatha Aiyangar *v.* Suppiah Chettiar.
C.R.P. No. 2262 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 14—Hindu family debt—Respective liability of agriculturist and non-agriculturist members—Applicability and scope of S. 14.

If a debt is a family debt it must be a family debt with regard to everybody and the members are personally liable for their proportionate share of debt and they cannot be liable unless the debt is a contractual one. S. 14 is applicable to such a debt. Where there are two non-agriculturist and five agriculturist members in a joint Hindu family the non-agriculturists are liable for 2/7 of the unscaled debt while the agriculturists are liable for 5/7 of the scaled down debts. It is not necessary that the property should be split up into individual shares and each share made liable only for its own share of the family debt.

V. Ramaswami Aiyar for Petitioner.

R. Sethurama Sastri for Respondent.

K. S.

Wadsworth, J.
22nd April, 1940.

Syed Sabjumiah Hussain *v.* Kalayigar Abdul Vaheb Sab.
C.R.P. No. 174 of 1939.

Court Fees Act (VII of 1870), S. 7 (v), (c)—Valuation for court fees at 15 times the nett profits—Profits of year previous to the filing of suit, in the nature of a windfall—If to be excluded from consideration—C. P. Code, S. 115—Revision—Decision on court fee in favour of plaintiff—Decision affecting jurisdiction—Interference in Revision.

In a suit for possession of land it was found that a portion of the land had been leased to the Municipality during the year previous to the filing of the suit at an annual rental of Rs. 186 for use as a nightsoil dumping ground. It was contended that this profit was in the nature of a windfall and should be excluded from consideration in determining the court-fee,

Held, S 7 (*v*), (*c*) does not give to the Court any option to consider whether or not the nett profits for the year preceding the presentation of the plaint are exceptional or unusual. Such profits cannot be excluded from consideration,

Held further, where a decision of the lower appellate Court though on a question of court-fee directs the trial Court to assume a jurisdiction which it has not got, the High Court can interfere in revision.

V. Govindarajachari for Petitioner.

P. Chandra Reddi for Respondent.

K. S.

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Horwill, J. Muhammad Sahib *v.* Kunthanmull Sowcar.
23rd April, 1940. C.R.P. No. 529 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 9—Interest calculated and paid off in full on 18th November, 1935 on promissory note of 4th March, 1933—Debtor whether entitled to have the interest calculated at 5 per cent. and the amount already paid adjusted accordingly—S. 12—Debt outstanding after scaled down debt—From what date to carry interest.

On 4th March, 1933, the defendant executed a promissory note for Rs. 300 in favour of the plaintiff. In October of that year he paid Rs. 100 towards principal. On 18th November, 1935 the interest outstanding was paid off. In a suit for the balance of principal and interest from the date of coming into force of Act IV of 1938 it was contended that interest at 5 per cent. must be calculated from date of debt and added to the principal and the amounts actually paid should be deducted.

Held, the interest having been paid off in full the plaintiff was entitled to a decree for the balance of the principal outstanding.

Held further, S. 12 entitled a creditor to interest on any sum remaining outstanding after the debt has been scaled down from the date upto which it has been scaled down that is, only from the date of the decree.

Basheer Ahmed Sayeed for Petitioner.

K. A. Chakravarthy for Respondent.

K. S.

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Wadsworth and Patanjali Sastri, JJ. Motam Kottayya *v.* Singampalli Venkata Pannayya.
26th April, 1940. C.R.P. No 1317 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 7, 8 and 9—"Decree"—Decree passed after the commencement of the Act—If liable to be scaled down.

On a promissory note executed on 29th October, 1929 a suit was brought on 3rd January, 1938 and the written statement filed on 30th January, 1938. Though Madras Act (IV of 1938) came into force when the suit was pending, the defendant failed to put forward a claim to have the debt scaled down in accordance with the Act and a decree was passed on 18th April, 1938 for the full amount claimed by the plaintiff. The defendant then applied for scaling down the debt on 29th April, 1938.

Held, reading the Act as a whole the word "decree" in Ss. 7, 8 and 9 must be taken to refer to decrees passed before the commencement of the Act and the decree passed after the commencement of the Act cannot be scaled down.

Kanakaraju v. Achutaramanaraju, (1940) 1 M.L.J. 600, overruled.

A. Lakshmayya for Petitioner.

M. Subramanya Sarma for Respondent

K. S.

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Wadsworth and Patanjali Sastri, JJ. Budiredla Ramamurti *v.* Motta
11th April, 1940. Sitaramayya.
C.R.P. No. 2010 of 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 7, 8, 9 and 19—Compromise decree—When can be scaled down on the basis of the original debt—Uncertified payments towards decree—How far can be proved for purposes of scaling down.

On 26th March, 1928, petitioner executed a promissory note in settlement of an account starting from 1922. On 3rd April, 1928, he executed a second promissory note for a fresh advance. On 20th July, 1929, he executed a promissory note, for Rs. 4,600 for the amount due on the two promissory notes and a small amount in cash advanced at that time. In a suit on the pronote there was a compromise decree on 8th August, 1932, for Rs. 7,150 for the debt, costs and subsequent interest and time was given till 1st October, 1932, for payment. In an application to scale down this compromise decree,

Held, when there is a decree passed before the 1st October, 1932, in terms of a compromise, which itself is demonstrably a renewal of an anterior debt, the Court must scale down the debt under s. 8 of the Madras Act, IV of 1938, treating as the principal the amount originally advanced together with the amount of any sums subsequently advanced. Whether a compromise is or is not a renewal of a pre-existing liability must to a large extent be a question of fact in every case. When a judgment-debtor applies under S. 19 of Madras Act, IV of 1938, to scale down a decree he can prove payments which have not been certified for the purpose of satisfying the decree regarding costs. For other purposes the debtor would have to establish those payments in the ordinary way under the Civil Procedure Code, by getting them certified in Court if he wants them to be taken into consideration as payments towards the decree.

V. Viyyanna for Petitioner.

D. Narasaraju for Respondent.

K. S.

Wadsworth, J. Yelamanchilli Basavayya *v.* Jaldu Manikyala Rao.
1st May, 1940. C.R.P. No. 534 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 23—Sales in execution held before 1st October, 1937—If can be re-opened by the Court.

S. 23 empowers the Court to re-open sales held under a decree on or after 1st October, 1937 notwithstanding the fact that the sales have been confirmed. But there is no provision empowering the Court to re-open a sale held before 1st October, 1937, though the sale is confirmed and decree is satisfied after that date.

K. Krishnamurthy for Petitioner.

N. Vasudeva Rao for Respondent.

K. S.

The Chief Justice and Krishnaswami Aiyangar, JJ. Madipatti Narasimha Moorthi *v.* Hayat Khan.
1st May, 1940. S. A. No 341 of 1935.

Civil Procedure Code (V of 1908), O. 41, r. 27 (2)—Admission of fresh evidence in appeal—Admission of documents not necessary for remedying some inherent lacuna or defect but for providing corroboration for oral testimony which was disbelieved by trial court—Legality.

The lower Appellate Court admitted some fresh documents in evidence. The admission of those documents was not for the purpose of remedying

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some inherent lacuna or defect but for the purpose of providing corroboration for oral testimony which had been disbelieved by the trial Judge. The oral evidence was complete and if it had been believed, it would have substantiated the first respondent's case. The additional evidence was not necessary for the court to appreciate the first respondent's case or to pronounce judgment on it.

Held, that the lower Appellate Court was wrong in admitting such evidence and the case must be decided on the evidence tendered in the trial Court.

V. Govindarajachari for Appellants.

P. Somasundaram for Respondent.

K. S.

Wadsworth, J. Roopchand Merlachn v. Sha Motaji Mokanaji.
1st May, 1940. C.R.P. No. 462 of 1940.

Madras Debt Conciliation Act (XI of 1936), S. 25—Stay under—Procedure—Duration of stay—If can be fixed by the Court.

When an application to the Debt Conciliation Board is rejected for a formal defect under S. 7, the stay granted under S. 25 will cease to operate but when that application is re-presented it becomes once more a subsisting application under S. 4 and the provisions of S. 25 will come into force and the executing Court will be obliged when the fact of this re-presented application is brought to its notice to stay proceedings in execution. That stay will operate until the application is dismissed subject of course to the legal requirement that the application shall be disposed of within one year. It is not open to the Court to order stay for any particular period. The duration of the stay is fixed by Statute and out of the hands of the Court altogether.

B. Narasimham for Petitioner.

P. S. Kothandapani for Respondent.

K. S.

Horwill, J. Dara Tripura Sundaralingam v. Vingamuri
3rd May, 1940. Venkataramanayya.
C.R.P. No. 2461 of 1939.

Madras Debt Conciliation Act—Ss. 4 and 25—Stay of execution of money decree pending proceedings before the Debt Conciliation Board under S. 4—Court if can impose any conditions in staying proceedings.

In staying proceedings under S. 25 of the Madras Debt Conciliation Act, the Court cannot impose any conditions, for the power to impose a condition implies a corresponding power to dismiss the application if the condition is not fulfilled. The imposition of any condition is therefore *ultra vires.* The Court has no discretion but to stay. No petition for stay is necessary. The Court upon its attention being drawn to the fact that proceedings are pending before the Debt Conciliation Board is bound to stay whatever proceedings are before it in connection with that debt.

P. Somasundaram for Petitioners.

V. Venkataramanayya for Respondent.

K. S.

Wadsworth, J. Adiseshа Iyer *v.* Muthukaruppan Chettiar.
22nd July, 1940. C.R.P. No. 303 of 1937.

C. P. Code (V of 1908), S. 73—Decree by a creditor against three persons—Another person getting a decree against one of them and his sons—Surety—Properties of the judgment-debtor brought to sale—Execution application filed against the surety by another creditor also—Whether rateable distribution possible in the circumstances.

A obtained a decree against *B, C* and *D*. *X* obtained a decree against *B* and his sons *E* and *F*. *A* had *B* arrested who was released on *M* standing surety for him. *X* brought *B's* properties to sale, but before the realisation of the sale proceeds, *A* had filed an execution petition against the surety *M* and on the strength of that claimed rateable distribution in the assets realised by *X*. It was contended by *X* that as *A* had filed an execution petition only against the surety *M* and not against the common judgment-debtor, he was not entitled to apply under S. 73,

Held, an application under S. 145, C.P. Code, to execute a decree passed against *B* by proceeding against his surety *M* is an application to execute a decree passed against *B* so as to entitle the decree-holder to apply under S. 73, C.P. Code, for rateable distribution of assets realised in execution of another decree passed against *B*. There is no separate decree against the surety which is being executed.

49 Mad. 325, followed.

S. S. Ramachandra Iyer for Petitioner.

T. R. Srinivasan for Respondent.

K. C.

Wadsworth, J. Muthuswami Chettiar *v.* Periyal Achi and another.
23rd July, 1940. C.R.P. No. 1378 of 1938.

Provincial Insolvency Act (V of 1920), S. 78 (2)—Insolvency—Widow of undischarged insolvent—Suit for declaration that she was entitled to the decree amount included to be realised by transferee decree-holder from her husband—Maintainability of suit—Annulment of insolvency—Limits of.

The widow of an undischarged insolvent instituted a suit on 21st June, 1937, claiming that a mortgage decree had been nominally transferred in favour of the defendant by her husband and that the defendant in execution of that decree bought the mortgaged properties himself and had them re-sold in two lots on 21st June, 1934, for Rs. 900 and on 12th September, 1934, for Rs. 800. It was claimed that the defendant was bound to pay the plaintiff the said sums with interest. To this suit the Official Receiver was added as party defendant though a decree was prayed for in favour of the widow. The lower Court recorded a finding that the suit was maintainable on the issue raised by the defendant as to the maintainability of the suit which was tried as a preliminary issue.

Held, that the revision petition was maintainable as the question of the jurisdiction of the Court arose directly for decision and as a decision on this question will terminate unnecessary proceedings. *Further held,* that suits were not maintainable by the insolvent or his representative till the annulment of the insolvency and that a suit, bad at the inception, could not be validated by a subsequent annulment.

1929 M. 480, followed.

1937 M. 717, referred to and distinguished.

1918 M. W. N. 289, referred to and followed.

K. V. Ramachandra Iyer for Petitioner.

K. S. Desikan and *C. D. Venkataraman* for Respondent.

K. C.

N R C

Wadsworth, J.
23rd July, 1940.

Vedala Vallabhacharyulu *v.* Veda Rangacharyulu and another.
C.R.P. No. 1123 of 1939.

Madras Agriculturists Relief Act (IV of 1938)—Court hearing appeal from decision in a suit wherein plaintiff seeks to escape liability from a decree of another Court—If has jurisdiction to scale down the decree attacked.

The Court hearing an appeal from a decision in a suit wherein the plaintiff seeks to escape liability from a decree of another Court, has no jurisdiction under S. 19 or any other section of Madras Act IV of 1938 to scale down the decree which is being attacked at the instance of the plaintiff.

C. Rama Rao for Petitioner.

P. V. Vallabhacharyulu for Respondent.

K. S.

Lakshmana Rao, J.
24th July, 1940.

Kesava Reddi *v.* Linga Reddi.
Crl. App. No. 179 of 1940.

Criminal trial—Conviction founded on evidence of approver—Jury not told that the evidence of accomplice must be corroborated in material particular—Sustainability of conviction.

A conviction was founded on the evidence of the approver which was not corroborated in any material particular bearing upon the implication of the first accused. The jury was not told that the evidence of an accomplice must be corroborated in some material particular bearing upon the implication of the accused in the crime.

Held, the conviction cannot be sustained.

N. Somasundaram for Appellant.

The Public Prosecutor for the Crown.

K. S.

King, J.
24th July, 1940.

Gandikota Kamanna *v.* Tonilappu Satti Reddy.
C.R.P. No. 863 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 3 (ii), Proviso B—Exclusion from definition of "agriculturist"—Assessment for four consecutive half years from October, 1935, to September, 1937—If necessary—If debtor should be validly "assessed" to exclude him from definition of "agriculturist".

It is quite clear from the language of S. 8 (ii), Proviso B of Act IV of 1938 that assessment for four consecutive half years from October, 1935 to September, 1937, is not required for exclusion of a debtor from the definition of "agriculturist". A person who is excluded from the definition of "agriculturist" under the proviso need not have been *validly* assessed. The words are simple "has been assessed" and they are qualified by no adverb relating to the correctness or validity of the assessment.

P. Somasundaram and *P. Suryanarayana* for Petitioner.

K. Kameswara Rao for Respondent.

K. S.

18th July, 1940. S.A. No. 1098 of 1937.

Limitation Act (IX of 1908), S. 19 (1)—Endorsement of payment of interest by mortgagor on mortgage deed—Subsequent registration of endorsement—Suit on mortgage within 12 years of registration but beyond twelve years of actual endorsement—Suit whether barred by limitation.

A mortgage for Rs. 200 was executed on 9th June, 1911. On 2nd June, 1923, the mortgagor paid Rs. 50 towards interest and the payment was endorsed by the mortgagor on the mortgage bond. On 29th September, 1923, this endorsement was registered, when the execution of the endorsement was admitted. The present suit was instituted on 18th July, 1935.

Held, that an admission of execution before the Registrar is an admission not only of the execution but has the same efficacy as an admission of the contents of the document and therefore of the liability of the executant imported by it. The admission before the Registrar constitutes a fresh acknowledgment of liability within the meaning of S. 19 of the Limitation Act.

57 Mad. 48, followed.

K. Krishnaswami Aiyangar for Appellant.

L. S. Veeraraghava Aiyar for Respondents.

K. S.

Abdur Rahman, J. Kanipakkam Venkata Reddi, Petitioner.
22nd July, 1940. C.R.P. No. 769 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 8 (1)—Pronote executed by mortgagor for interest due in respect of mortgage—Deemed to be discharged as interest outstanding on 1st October, 1937.

A promissory note was taken for the interest due in respect of a mortgage and nothing was paid in cash. In a suit on the promissory note.

Held, it must be deemed to be discharged as interest outstanding on 1st October, 1937.

S. A. Seshadri Aiyangar for Petitioner.

K. S.

Krishnaswami Aiyangar, J. Rangayya Chetti *v.* Venkatraya Chetti and another.
23rd July, 1940. S.A. No. 667 of 1937.

Limitation—Part payment of debt evidenced in writing signed by debtor—Intention to keep alive debt—If necessary.

The statute attaches to a part payment when it appears in a writing signed by the person making the payment a certain efficacy, that the debt is kept alive. It is unnecessary to search for the intention of the payer.

(1940) 1 M.L.J. 895 (P.C.), Relied on; 68 M.L.J. 73 no longer good law.

T. K. Srinivasathathachari and *K. Ramaswami Aiyangar* for Appellant.

B. C. Seshachalla Aiyar and *C.S. Rajappa* for Respondents.

K. S.

Wadsworth, J. Viswanatha Pattar Kariakkar *v.* Sankaran Unni.
25th July, 1940. C.R.P. No. 875 of 1939.

Small Cause Court returning plaint for presentation to Court having original jurisdiction—Later Court if can again return the plaint.

A Small Cause Court having found that it had no jurisdiction its order for the presentation of the plaint to the Court having original jurisdiction, even if erroneous cannot be questioned by the latter Court.

10 M.L.J. 313, relied.

C. S. Krishnamurthi Aiyar and *C. S. Vidyasankara Menon* for Petitioner.

K. Kuttikrishna Menon for Respondent.

K. S.

N R C

29th July, 1940. and others.

C.R.P. No. 131 of 1939.

Madras Agriculturists Relief Act (IV of 1938)—Judgment-debtor depositing under O. 21, r. 89, C.P. Code, the amount necessary to have sale set aside and decree-holder drawing amount in full satisfaction of decree—Application for scaling down—Sustainability—Deposit on date when Act IV of 1938 came into force—Effect.

The petitioner deposited under O. 21, r. 89 of the Code of Civil Procedure the amount necessary to have the sale set aside and this amount was withdrawn by the decree-holder in full satisfaction. The deposit was made on the date when Act IV of 1938 came into force but the application for sealing down was made long after.

Held, there no longer remained a debt to found an application under Act IV of 1938 or a decree to scale down. There is no subsisting sale to set aside and the fact that the deposit was made on the day the Act came into force has no bearing as the application was made long after.

J. S. Vedamanikam for Petitioner.

K. S.

Venkataramana Rao, J.
30th July, 1940.

Bethina Pandithan *v.* The Trichinopoly Municipality.

S.A. No. 969 of 1937.

Deed—Construction—Standard of measurement—"Human foot" mentioned in document—Computation—Need for taking evidence as to rate of conversion.

The human foot was mentioned as the standard of measurement in certain documents in a case. The District Judge proceeded to consider the case on the assumption that one human foot was equal to ten inches.

Held, the case ought not to have been dealt with on that footing. Evidence should be adduced to find out the rate of conversion of the human feet into inches with reference to the documents in question.

J. S. Vedamanikam and *T. Bhakiam* for Appellant.

N. Sivaramakrishna Ayyar for Respondent.

K. S.

Lakshmana Rao, J.
1st August, 1940.

In re Hussain Khan *alias* Sulaiman Khan and another.

Crl. App. No. 199 of 1940.

Madras Children Act (IV of 1920), Ss. 21 (1) and 26 (1)—Young person charged under S. 326, I.P. Code, pleading guilty—Sentence of Rs. 50 fine—Notice under S. 21 (1) of Madras Children Act to father and direction under S. 26 (1) to pay the fine—Father not given opportunity to show that he had not conduced to the commission of offence—Proper procedure.

The first appellant a young person pleaded guilty to a charge under S. 326, I.P. Code, and he was sentenced by the Juvenile Court to pay a fine of Rs. 50. The second appellant, the father, was present in obedience to the notice under S. 21 (1) of the Madras Children Act and he was directed to pay the fine under S. 26 (1) of the Act. No opportunity was given to him to show that he had not conduced to the commission of the offence by the appellant nor was there any indication that the offence was due to any neglect of the father.

Held, the order under S. 26 (1) imposing the fine should be set aside and the proper course was to commit the first appellant to the custody of his father on his executing a bond to be responsible for the good behaviour of the son.

P. A. Krishnamurthi Nair for Appellant.

The Crown Prosecutor for the Crown.

K. S.

King, J. Puthuveettil Cheeru *v.* Chenenkeel Pannoru
24th July, 1940. Chathu Nambiar and another.
C.M.S.A. No. 14 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 15—Assignee from original tenant, not personally liable for rent prior to assignment to him—If entitled to benefit under S. 15.

The appellant was an assignee of the original tenant and in a claim for arrears of rent by the lessor he claimed that by his payment of the rent due for Faslis 1346 and 1347 all the arrears were wiped out under S. 15 of Act IV of 1938.

Held, though the arrears are not payable personally by the assignee he can take full advantage of S. 15 and an assignee is in no worse position than an original lessee.

C. K. Viswanatha Ayyar for Appellant.

P. Govinda Menon for Respondents.

K.S. ———

Patanjali Sastri, J. Ramachandra Rao, minor by next friend
24th July, 1940. Veerayya *v.* Butchamma.
C.R.P. No. 1200 of 1938.

Court-Fees Act (VII of 1870), S. 7, Cl. (5)—Suit impeaching alleged will executed by his father as forgery and that property was joint family property and for possession—Court-fee payable.

Where the plaintiff impeaches an alleged will by his father on the ground that it is a forgery and also on the ground that the property disposed of by it was joint family property and claims possession, the suit is not a mere suit for declaration without consequential relief. If the will is invalid the plaintiff will be entitled to the property in question. The correct Court-fee payable will be on the market value of the property whose possession is prayed for.

A. Lakshmayya for Petitioner.

The Government Pleader (B. Sitarama Rao) and *V. Govindarajachari* for Respondent.

K.S. ———

Lakshmana Rao, J. Balayya Naidu—Accused.
25th July, 1940. Crl. App. No. 554 of 1939.

Madras City Police Act (III of 1888), Ss. 37 (2) and 45—Using premises for receiving bets on horse races—Offence under S. 37 (2)—Persons found in the premises making calculations, etc., as to result of horse race—Liability to conviction for offence under S. 45 of the City Police Act.

Where the accused uses his place of business for conducting a bucket shop he would be guilty of an offence under Ss. 37 (2) and 45 of the City Police Act of permitting the place to be used for the purpose of gaming on horse races and conducting or assisting in the business of a common gaming house. Other persons who were found in the premises making calculations would be guilty under S. 45 of assisting in conducting of the business of the common gaming house.

B. T. Sundararajan and *C. C. Sowlon* for Appellant.

The Crown Prosecutor for the Crown.

K.S. ———

King, J. Godavarti Surayya *v.* Mantravadi Gopalam.
26th July, 1940. C.R.P. No. 618 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 8—"Assignee of creditor" is "same creditor" within the meaning of S. 8—"Advanced as principal"—Meaning.

NRC

The fact that there have been assignments of the promissory notes cannot prevent assignor and assignee being the "same creditor" within the meaning of S. 8 of the Act. The words "advanced as principal" occurring in the explanation to the section must be read in their ordinary every day sense as referring to actual fresh loans and not as referring to arrears of interest treated as principal at the time of the renewal of the promissory note.

Followed by *Wadsworth, J.*, in C.R.P. No. 140 of 1939 in judgment dated 29th July, 1940.

K. Bhimasankaram for Petitioner.

K. Kotayya for Respondent.

K.S.

Wadsworth, J. Kamakshi Chetty *v.* Alaganan Chettiar.
29th July, 1940. C.R.P. No. 905 of 1938.

Madras Agriculturists Relief Act (IV of 1938), S. 27—Certificate given by Local Board—If conclusive of the facts which it states.

A certificate given by a Local Board is not conclusive of the facts which it states. It is open to the other side to let in evidence that the certificate is not true—whether the error alleged relates to the amount of the tax or the nature of the income in respect of which it was levied.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Petitioner.

T. P. Gopalakrishna Aiyar for Respondent.

K.S.

King, J. Adhimoola Udayan *v.* Govinda Udayan.
30th July, 1940. A.A.O. No. 322 of 1939.

Limitation Act (IX of 1908), Arts. 181 and 166—Decree and execution against joint family property—Purchase by decree-holder—Suit by minor sons of decree-holder on attaining majority to recover possession of the property as not belonging to joint family but exclusively to themselves—Sale sought to be set aside whether void or voidable.

A decree-holder, who had obtained a decree against a father personally and against the joint family property of the father and his two minor sons himself purchased some properties in the sale in execution of his decree as joint family property. One of the sons on attaining majority sued to recover the property contending that it was not joint family property but belonged exclusively to themselves.

Held, the sale was void and Art. 181 of the Limitation Act applied. I.L.R. 48 Mad. 818 followed in preference to I.L.R. 50 Mad. 639. Out of two conflicting views on a question of limitation one which is more favourable to the plaintiff must be preferred.

K. V. Krishnaswami Iyer and *N. Arunachalam* for Appellant.

K. Srinivasan for Respondent.

K.S.

Wadsworth, J. Nachiyammal *v.* Parvathiammal.
31st July, 1940. C.R.P. No. 967 of 1938.

Madras Agriculturists Relief Act (IV of 1938), S. 3 (ii)—Limited interest of widow in husband's property—If saleable interest.

The limited interest of a widow in her deceased husband's property is a saleable interest within the meaning of S. 3 (ii) of Madras Act IV of 1938. Clearly a widow has a right to sell her interest and though the sale may be set aside after her death, so long as it is not set aside, it vests the property in the vendee.

K. Desikachari for Petitioner.

N. Vasudeva Rao for Respondent.

K.S.

Lakshmana Rao, J.
31st July, 1940.

In re Vasireddi Sivalinga Prasad.
Crl.R.C. No. 24 of 1940.
(Crl.R.P. No. 21 of 1940).

Penal Code (XLV of 1860), S. 504—Person addressing a meeting and in the course of the speech abusing the complainants—Complainants not present at the meeting—Conviction under S. 504, I.P. Code—Sustainability.

The accused was an organising secretary of the Andhra Provincial Ryots Association and he addressed a meeting of the ryots and in the course of his speech on the Inam legislation abused the Zamindarini and her agents. But neither the Zamindarini nor her agents were present at the meeting.

Held, the conviction of the accused under S. 504, I.P. Code, is unsustainable.

A. Lakshmayya for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K.S.

Pandrang Row and
Abdur Rahman, JJ.
2nd August, 1940.

Venugopal Pillai and others *v.*
Thirugnanavalli Ammal.
Appeal No. 338 of 1937.

Civil Procedure Code (V of 1908), O. 2, r. 2 and S. 149—Earlier suit for cancelling a lease in respect of suit properties—Later suit for past mesne profits—Whether barred—C. P. Code, S. 149—Grant of time for payment of deficit Court-fee after claim barred by limitation—Effect.

After an earlier successful suit for cancelling a certain lease the plaintiffs filed a suit for past mesne profits. It was contended that this suit was barred by C. P. Code, O. 2, r. 2, on the ground that the claim for mesne profits should have been included in the earlier suit inasmuch as it arose out of the same cause of action. In the plaint in the earlier suit the plaintiff had stated that he intended to bring a separate suit in respect of past mesne profits.

Held, following I.L.R. 38 Mad. 829 (F.B.) and 51 M.L.J. 252 that the claim for mesne profits need not be included in a suit for recovery of possession of property in respect of which mesne profits are claimed by reason of O. 2, r. 2, C. P. Code.

61 M.L.J. 294 (P.C.) distinguished.

Held, further, whatever the reasons for the Courts granting time for payment of deficit Court-fees, the effect of the grant of time, even if it is after th claim is barred by limitation, is that the plaint takes effect as if it had been presented along with the full Court-fee on the date of its first presentation.

51 M.L.J. 90, relied on.

J. R. Gundappa Rao for Appellants.

T. R. Ramabhadrachari for Respondent.

K.S.

Burn and Mockett, JJ.
5th August, 1940.

The Public Prosecutor *v.* Karuppan.
Crl. App. No. 341 of 1940.

Indian Penal Code (XLV of 1860), Ss. 302 and 326—Accused stabbing with a pen knife in the chest and thereby causing death—Accused illiterate—If can be presumed to have no knowledge that death will ensue—Proper conviction.

The accused stabbed the deceased with a penknife in the heart and caused death. The Sessions Judge convicted him only for grievous hurt under S. 326, Indian Penal Code, holding that the accused as an illiterate cannot

be expected to have such knowledge of the human anatomy that the Act committed by him can be safely connected with the knowledge that by such act, death must certainly ensue.

Held (on appeal), there are no human beings so illiterate as not to know that a stab to the heart causes death. When a person voluntarily does an act endangering the life of another and thereby causes his death the offence is clearly one of murder.

M. C. Sridharan for Accused.

K.S.

Wadsworth, J. Padmanabhan Nair *v.* Appu *alias* Theyyan.*
8th August, 1940. C.R.P. No. 1157 of 1937.

Civil Procedure Code (V of 1908), 80—Acting adhikari *attaching crops—Suit against him for recovery of excess amount collected by him when* adhikari *but filed after he ceased to be such officer—Notice under S. 80—Whether necessary.*

The notice contemplated by S. 80, C. P. Code, for a suit against a 'public officer' is unnecessary in the case of a suit against an officer who on the date of the suit had ceased to be such officer. Accordingly in a suit (for recovery of excess amounts collected) against an acting *adhikari* who had attached certain properties of the plaintiff when he was so acting, but after he had ceased to be such officer, notice under S. 80, C. P. Code, is not necessary.

S. R. Subramaniam for Petitioner.

K. P. Ramakrishna Aiyar for Respondent.

K. S.

[*F.B.*].

The Chief Justice, Venkataramana Rao and Horwill, JJ. Kayambu Pillai *v.* Lakshmi Ammani Ammal.
13th August, 1940. S. R. No. 27375 of 1939.

Court-Fees Act (VII of 1870), Art. 1, Sch. II—Dismissal of pauper appeal on default of dispaupered appellant in paying the Court-fee and furnishing security for costs—Review application—Proper Court-fee payable.

In an appeal in *forma pauperis* the appellant was dispaupered and directed to pay the Court-fee for the appeal and security for costs of respondent. On default of payment by the appellant the appeal was dismissed. An application for review of the dismissal order was made stamped with a Court-fee of Rs. 2. The Court-fee examiner raised the objection that the application should be stamped *ad valorem* under Art. 4 of Sch. I as on a memorandum of appeal.

Held, the order of dismissal of the appeal for non-payment of Court-fee consequential to the order of dispaupering as well as for the non-furnishing of security under O. 41, r. 10 (2), must be deemed to be an order of dismissal for default and therefore is not a decree under S. 2 (2) of the C. P. Code and therefore a Court-fee of Rs. 2 is the proper Court-fee on a petition for a review of that order under Art. 1 (*d*), Sch. II of the Court-Fees Act.

S. Sundaresa Aiyar for Appellant.

The Government Pleader (B. Sitarama Rao) for Government.

K.S.

Wadsworth, J. Sundara Reddiar *v.* Alagappa Chettiar.
23rd July, 1940. C.R.P. No. 15 of 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 19 and 20—Death of judgment-debtor just before expiry of the sixty days time allowed under S. 20 for applying for scaling down—Legal representative—If entitled to file a fresh application for stay under S. 20—Procedure.

A judgment-debtor died on 4th June, 1938, just before the expiry of the sixty days time allowed under S. 20 of Act IV of 1938 without an application under S. 19. His son was impleaded as legal representative on 19th October, 1938, when he asked for time to oppose the execution. On 14th December, 1938, he filed a fresh application under S. 20.

Held, the fresh application did not lie. The son succeeds to the rights and liabilities of his father in the litigation. His father had already exhausted his remedy under S. 20 and by express terms of that section the decree must be executed against him as it stands. The legal representative is subject to the same liability.

T. R. Ramabhadrachariar for Petitioner.

S. Panchanatha Mudaliar for Respondent.

K.S.

Patanjali Sastri, J. Meyappa Chettiar *v.* Ramaswami Chettiar.
24th July, 1940. C.R.P. No. 562 of 1937.

Limitation Act (IX of 1908), Arts. 61 and 120—Stamps for a sale certificate purchased by one of the joint purchasers of property—Suit for contribution—Limitation.

The claim was for contribution in respect of a half share of the amount spent by the petitioner for purchase of stamps for a sale certificate issued in respect of properties jointly purchased by the petitioner and respondent. The stamps were purchased on 13—2—33 and sale certificate issued by the Court on 20—2—33. The suit was brought on 18—2—36.

Held, the cause of action did not arise immediately on the purchase of the stamps. Until the stamps are actually used the petitioner could not claim to recover any part of the purchase-money of the stamps. Art. 61 which presupposes the existence of a cause of action when the payment was made cannot be applicable.

48 M.L.J. 271, applied.

The proper article applicable is 120 and the suit is in time.

V. Ramaswami Aiyar for Petitioner.

A. C. Sampath Aiyangar for Respondent.

K.S.

Wadsworth, J. Venkataswami Nayakkan *v.* Ramaswami Nayakkan.
26th July, 1940. A.A.A.O. No. 210 of 1938.

Execution—Executing Court—If can question validity of decree—Insolvency of one of the defendants and failure to obtain leave to sue from Insolvency Court—If ground for questioning validity of decree in execution proceedings.

The executing Court has no power to question the validity of the decree. *See* 27 Mad. 118 and 28 Mad. 26. The executing Court has no power to question the validity of the decree on the ground of the insolvency of one of the defendants and the failure to obtain leave to sue. It is particularly undesirable to allow a judgment-debtor to raise such a plea where the decree has remained unquestioned since it was passed in 1917 till the execution in 1936.

V. V. Ramadurai for Appellant.

Respondent not represented.

K.S.

N R C

Patanjali Sastri, J.
26th July, 1940.

Nirogi Venkatasubba Rao *v.* Special Officer, Peddapur Municipality.
C.R.P. No. 829 of 1937.

Indian Contract Act (IX of 1872), S. 65—Chairman of Municipality authorised to undertake a journey to Madras to make certain representations to the Local Government—Sanction and payment of expenses by Council to Chairman—Sanction of Local Government not obtained as required by R. 53, District Municipalities Act—Special officer taking the place of superseded municipality if entitled to claim refund on the ground that contract is invalid or discovered to be invalid.

A chairman of a Municipality was authorised by the council to undertake a journey to Madras to make certain representations to the Local Government. The travelling expenses were sanctioned and paid. But the sanction of Local Government required by r. 53, District Municipalities Act, was not obtained. The Special Officer of the Municipality after the supersession of the Municipality sued for return of the money under S. 65, Contract Act.

Held, S. 65, Contract Act, did not apply to the case as there is no question of any invalid contract or contract discovered to be void. The expenses paid are not liable to be refunded.

P. V. Rajamannar and *K. Subba Rao* for Petitioner.

K. V. Gopalaswami for Respondent.

K.S.

King, J.
30th July, 1940.

Rasappa Pillai *v.* Palaniandi Pillai and others.
A.A.A.O. No. 173 of 1938.

Madras Agriculturists Relief Act (IV of 1938), S. 8—Applicability—Order setting aside sale on deposit of necessary amount under Civil Procedure Code (V of 1908), O. 21, r. 89—Suit ultimately dismissed—Amount payable by way of restitution—If debt within meaning of Madras Act IV of 1938, S. 8.

The liability to restore with interest the money deposited by a party under O. 21, r. 89, C.P.C., for setting aside a sale after the decree has been reversed is a "debt" within the meaning of Act IV of 1938 and the provisions of S. 8 of the Act are applicable.

T. K. Sundararaman for Appellant.

B. Sitarama Rao (Government Pleader) for Respondents.

K.S.

Venkataramana Rao, J.
2nd August, 1940.

Muddala Rajappala Naidu *v.* Balasurya Prasada Rao.
S.A. No. 685 of 1937.

Madras Estates Land Act (I of 1908), Ss. 27 and 28—Purchase by landlord—Effect on old patta—Calculation of rent—Principles.

Once there has been a purchase by the landlord in court auction the old patta ceases to be in force and can no longer be the basis of calculation of rent. The Court before determining what is fair and equitable rent will have to determine what the commutation rate is. If it is not possible to ascertain the commutation rate then the Court can fix a fair and equitable rent.

B. Jagannadha Das for Appellant.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
19th August, 1940.

Rayan Duraiswami Iyengar *v.* Raghavachariar.
C.R.P. No. 1607 of 1938.

Madras Agriculturists Relief Act (IV of 1938), S. 8 (i)—"Open payments made before 1—10—1937—If can be appropriated towards interest by creditor after the debtor has sought relief under the Act.

Towards a debt due on a promissory note dated 20—4—1935 which itself was in renewal of an earlier promissory note dated 19—4—1926 for Rs. 1,000, the debtor made a payment of Rs. 1,000 on 2—8—1937 and endorsed the payment "towards this pronote".

Held, the creditor should not be entitled after the debtor has sought relief under Act IV of 1938 to treat the payment as having been theoretically appropriated towards interest when in fact it was not appropriated at all and the interest outstanding on 1—10—1937 will be wiped out under S. 8 (i) and the whole debt is discharged.

(1940) 1 M.L.J. 895 (P.C.), relied on.

Decision of Horwill, J., in (1940) 1 M.L.J. 225, overruled.

R. Krishna Ayyar for Petitioner.

M. S. Venkatarama Ayyar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
19th August, 1940.

Subbarama Iyer *v.* Venkatachalapathi Iyer and others.
C.R.P. No. 513 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 3 (ii) (a)—Simple mortgagee of agricultural land—If an 'agriculturist'.

A simple mortgagee is a person having a saleable interest in land and so an "agriculturist" within the meaning of the Act.

O. V. Baluswamy for Petitioner.

K. Vydhianathan for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
19th August, 1940.

Periasami Chettiar and another *v.* S. A. Ramaswamy Gounder.
C.R.P. No. 653 of 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 3 (ii) (a), 7 and 19—Simple mortgagee—If "agriculturist"—Puisne mortgagee—If a debtor entitled to have debt scaled down—Decree on appeal—Jurisdiction of trial Court to scale down under S. 19.

A simple mortgagee is a person having a saleable interest in land and is an agriculturist under S. 3 (ii) (a). C.R.P. No. 513 of 1939, followed.

A puisne mortgagee who was impleaded as a defendant in a suit for sale by a prior mortgagee and against whom a decree was passed giving him a right of redemption of the prior mortgage is a debtor within the meaning of S. 7. Decision of Newsam, J., in (1939) 2 M.L.J. 225, overruled.

A trial Court has jurisdiction to scale down a decree of the appellate Court under S. 19 of the Act.

K. S. Sankara Iyer for Petitioners.

K. Bhashyam Iyengar and *T. R. Srinivasan* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
20th August, 1940.

Narayanaswami Reddi *v.* Veeraswami Reddi and another.
C.R.P. No. 1634 of 1938.

Madras Agriculturists Relief Act (IV of 1938), S. 3 (ii) Proviso (D)—Owner of shares in more than one estate paying only in the aggregate more than Rs. 500 as peshkash—If included in Proviso (D) to S. 3 (ii).

S. 3 (ii) Proviso (D) of Act IV of 1938 covers the case of a landholder having shares or portions in respect of more than one estate and paying more than Rs. 500 as peshkash in the aggregate and such a person shall not be deemed to be an "agriculturist" under the Act.

K. Bhashyam Iyengar and *R. Viswanatha Iyer* for *T. R. Srinivasan* for Petitioner.

T. M. Krishnaswami Iyer and *A. Srirangachariar* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
20th August, 1940.

Anantaramakrishna Iyer *v.* Sundaram Iyer.
C.R.P. No. 711 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 8 (1)—Appropriation of payments towards interest and costs made before 1—10—1937—If can be reopened under S. 8 (1).

Appropriations towards interest and costs made before 1—10—1937 cannot be reopened and readjusted under S. 8 (1) of Madras Act IV of 1938. Appropriations made after 1—10—1937 will be available for readjustment towards the principal first under S. 8 (1).

R. Ramasubbu for *K. Venkateswaran* for Petitioner.

N. G. Krishna Iyengar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
20th August, 1940.

Periasami Pillai *v.* Sivathia Pillai.
C.R.P. No. 1482 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 3 (ii), Proviso—Burden of proof as to whether a person comes under the exception in the Proviso to S. 3 (ii).

The initial burden is on the petitioner (the debtor) to prove that he is an agriculturist. Then the burden shifts on the respondent to prove that the debtor falls under any of the Provisos to S. 3 (ii). Again the burden shifts on the petitioner to prove that he does not pay a sum of Rs. 100 as poruppu or the like.

A. Sundaram Ayyar for Petitioner.

Respondent not represented.

K.S.

Wadsworth and Patanjali Sastri, JJ.
20th August, 1940.

Itikala Suryanarayanamurty *v.* Reddi Viramma.
C.R.P. No. 1602 of 1938.

Madras Agriculturists Relief Act (IV of 1938), Ss. 8 (1) and 19—Payments after 1—10—1937 towards decree on debt incurred before 1—10—1932 appropriated towards interest and costs—If to be reopened and readjusted under S. 8 (1)—Reappropriation if "refund" within meaning of S. 8 (4).

Payments were made and appropriated after 1—10—1937 towards costs and interest on a decree on a debt anterior to 1—10—1932. It was contended that the reopening of the appropriations and then reappropriation according to Ss. 7 and 8 (1) will amount to a "refund" within the meaning of S. 8 (4) and therefore not permissible.

Held, the appropriations made after 1—10—1937 towards interest due before that date can be reopened and readjusted first towards the costs then interest due from 1—10—1937 and next towards the principal, and that the word "refund" in S. 8 (4) means only repayments in cash and that it is no bar to readjustment of the debt according to S. 8 (1) of the Act.

K. Bimasankaram for Petitioner.

Ch. Raghava Rao for Respondent.

K.S.

Wadsworth, J.
23rd July, 1940.

Chandrasekhara Ayyar *v.* Official Receiver, West Tanjore.
C.R.P. No. 1257 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 3—"Jodi kattubadi poruppu or the like"—If include payments for "kaval", "road-cess" and "water-cess".

The petitioner admitted possession of eight villages in respect of which he pays as *jodi* Rs. 6-4-0 only, though he pays approximately Rs. 72,889 and Rs. 244 respectively for kaval fees, road-cess and water charges. In an application for scaling down a debt by the petitioner claiming to be an agriculturist,

Held, in "jodi, kattubadi and poruppu or the like" the words *or the like* must be taken to denote any other payment in the nature of quit rent on an inam, whatever be the names by which they are denoted and does not include charges for police (kaval), for roads, for water and similar dues levied for services rendered by the state or by a local authority. The petitioner is therefore an agriculturist.

S. Panchapagesa Sastri with *T. K. Sundararaman* for Petitioner.
K. S. Desikan for Respondent.

K.S.

Patanjali Sastri, J.
26th July, 1940.

Karnam Syama Rao *v.* Hanumantha Rao, minor by guardian.
C.R.P. No. 1256 of 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 11 and 19—Compromise decree—Gross amount agreed to be payable in full satisfaction of suit claim and costs—If can be reopened and scaled down—Appropriation towards costs which would have been payable—Permissibility.

Where parties enter into a compromise agreeing that a certain sum should be payable in full satisfaction of the suit claim and costs without allocating any part of that sum specifically to the costs of the suit, the provisions of Ss. 11 and 19 cannot be invoked by the creditor. The Court has no power in a case of that kind to reopen the compromise, tax the costs that would have been awarded if the suit had succeeded after contest and direct its payment, when the judgment-debtor applies for scaling down a decree under S. 19 of the Act.

K. S. Jayaram for Petitioner.
A. C. Sampath Ayyangar for Respondent.

K.S.

The Chief Justice and Horwill, J.
26th July, 1940.

Ebrahim Sait *v.* Mettupalam Narayani Bank, Ltd., and others.
O.S.A. No. 17 of 1939.

Powers—Construction—Agent of petitioning creditor with authority "to attend to all the affairs and court proceedings"—If confers power to present a petition in insolvency—Presidency Towns Insolvency Act, S. 9 (e)—Earlier attachments continuing for more than three weeks—Later similar act of insolvency—If can be relied on for adjudication.

The secretary of a banking company was authorized to attend to all the affairs of the Bank including court proceedings relating to the Bank. It was contended that the secretary had no authority to act in insolvency on behalf of the Bank.

Held, a petition in insolvency involves proceedings in Court and the secretary had full authority to file a creditor's petition in insolvency on behalf of the Bank.

Held, further, that a debtor can commit more than one act of insolvency and even where there is an act of insolvency committed as the result of a previous attachment for more than three weeks there could be a second act of

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insolvency of the same nature which can be relied on for adjudicating a debtor.

T. V. Srinivasan for Appellant.

K. R. Krishnan, M. S. Venkatarama Aiyar, M. Krishna Bharathi, R. Karunakaran and *U. Lakshmanna* for Respondents.

K.S.

King, J. Mahammad Ibrahim *v.* Pilli Viraswami.
31st July, 1940. C.R.P. No. 885 of 1937.

Madras Village Courts Act (I of 1889), S. 73—Decree of village court on claim which on the face of it was five years old and barred—If can be set aside by the District Munsif as unjust under S. 73.

A decree was passed by the Village Court on a claim which was *prima facie* five years old and barred by limitation. The defendant remained *ex parte* and succeeded only by applying himself under S. 73 of the Village Courts Act to the District Munsif and proving before him what he ought to have proved before the Village Court itself.

Held, a decree passed upon the uncontradicted assertions of the plaintiff cannot be called unjust but a decree passed in clear defiance of the provisions of the Limitation Act is unjust within the meaning of S. 73 of the Act and must be set aside. C.R.P. No. 64 of 1936, distinguished.

C. M. Kurvilla for Petitioner.

Respondent not represented.

K.S.

Wadsworth, J. Karnam Subramanya Rau *v.* Pulla Rami Reddi.
2nd August, 1940. C.R.P. No. 1252 of 1939.

Practice—Res judicata—Finding on an issue by the presiding judge—If can be altered or reopened and decided by his successor.

When an issue has been made the subject of a final order by a court, that order cannot be ignored by a succeeding judge nor has the court jurisdiction to alter its own decision except on grounds which would justify a review.

P. C. Parthasarathy Ayyangar for Petitioner.

P. Chandra Reddy for Respondent.

K.S.

Wadsworth, J. Gudipati Brahmanandam *v.* Gudipati Sarveswara Row and others.
9th August, 1940. C.R.P. No. 1543 of 1937.

Civil Rules of Practice, r. 183—Sale of attached debt contrary to the rule—Effect on validity of sale.

There is nothing in r. 183 of the Civil Rules of Practice which would justify the conclusion that a sale of a debt which was attached in execution is void, merely because the court would have been better advised to have realised it by the appointment of a receiver having regard to the terms of r. 183. It can be set aside only by an application and Art. 166 of the Limitation Act will apply.

P. Satyanarayana Rao for Petitioner.

K. Venkatarama Raju for Respondents.

K.S.

Wadsworth, J. Chintakrindi Kanakayya *v.* Thuraga Vasudeva Rao.
14th August, 1940. C.R.P. No. 880 of 1940.

Civil Procedure Code (V of 1908), O. 40, r. 3—Appointment of receiver with consent of parties on certain conditions—Jurisdiction of Court to impose further conditions.

The consent of parties to the appointment of a receiver on certain conditions does not bind the Court to impose no further conditions. The Court has a jurisdiction whether there be a consent or not, to give its receiver directions contemplated in O. 40, r. 3 of the C. P. Code. And even if the Court's order imposing conditions more onerous than those to which the parties have consented were deemed to be ill advised, it could not be deemed to be without jurisdiction so as to justify interference in revision.

P. Somasundaram for Petitioner.

K. Krishnamoorthi for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
21st August, 1940.

Neelappa Reddi *v.* Sollamuthu Odayar.
C.R.P. No. 113 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 8, Explanation—Scope.

A pronote executed by *A* was discharged by a pronote executed by *B* to the same creditor. It was contended that this was a renewal of the debt due to the same creditor within the meaning of the explanation to S. 8.

Held, the explanation to S. 8 does not cover a case of this kind.

68 L.T. 29 and decision of Somayya, J., in (1939) 2 M.L.J. 309, followed.

K. Aravamuda Aiyangar for Petitioner.

Y. Venkatasubramanyam for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
21st August, 1940.

Ediga Seshamma *v.* Venkataramana Rao.
C.R.P. No. 223 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 8, Explanation—Purchaser of mortgaged property executing fresh mortgage to the mortgagee on date of purchase itself—If same debtor.

A purchased a mortgaged property and at the same time executed a mortgage in favour of the original mortgagee. It was contended that this mortgage was in renewal of a pre-existing liability.

Held, following C.R.P. No. 113 of 1939 that the debtor was not the same and the debt was not in "renewal or inclusion of the earlier mortgage debt".

(1939) 1 M.L.J. 609, approved. (1938) 2 M.L.J. 1068, referred to.

S. S. Bharadwaj for Petitioner.

J. V. Srinivasa Rao for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
22nd August, 1940.

Periakaruppan Chettiar *v.* Marappa Goundan and others.
C.R.P. No. 946 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 8 (1)—Payments appropriated by creditor towards interest in his plaint filed before 1—10—1937—If can be reopened.

In his plaint filed before 1—10—1937 the plaintiff appropriated payments by his debtor, towards interest.

Held, these appropriations cannot be ignored for the purpose of S. 8 (1) of the Act, and scaling down must be on the basis of the amount claimed in the plaint as principal.

M. Krishna Bharathi for Petitioner.

Respondents not represented.

K.S.

Wadsworth and Patanjali Sastri, JJ.
22nd August, 1940.

Mullapudi Perraju *v.* Pabbisetti Ramayya.
O.R.P. No. 882 of 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 8, 12 and 19—Payment before decree of amount sufficient to discharge debt as scaled down—Effect—If can be appropriated towards cost.

Interest outstanding on 1—10—1937 is cancelled and there is due on that day only the principal subject to interest at 6¼ per cent. having regard to S. 12. Where a payment sufficient to discharge this scaled down debt is made on 4—3—1938 before the decree, the debt is discharged and the payment cannot be appropriated towards costs under proviso to S. 19 as it is not a payment in respect of the decree. The creditor is entitled to a decree for costs only, with interest thereon at 6 per cent. per annum.

C. V. Dikshitulu for Petitioner.

K. Umamaheswaram for Respondent.

K.S.

The Chief Justice and Horwill, J.
22nd August, 1940.

Bhide *v.* Travancore National and Quilon Bank, Ltd., by its Liquidators.
O.S.A. No. 46 of 1939.

Companies Act (VII of 1913 & 1936), S. 230-A—Application for rescission of contract on the winding up of company—Maintainability.

The appellant had entered into a contract with the bank for financing some contract work. After suspension of payment by the bank amounts under the contract, were not advanced.

Held, (reversing the decision of Venkataramana Rao, J., directing the appellant to file a regular suit), that an application under S. 230-A of the Companies Act for rescinding the contract and other reliefs, would lie to the Court which wound up the company and no suit can be filed.

R. Krishnaswami Iyengar, C. R. Pattabhi Raman and *C. V. Nilakantan* for Appellant.

C. Krishnaswami Aiyar for *Messrs. King and Partridge* for the Liquidators.

K.S.

Wadsworth and Patanjali Sastri, JJ.
22nd August, 1940.

Chithapragada Veeraraju *v.* Chithapragada Buchiraju.
O.R.P. No. 603 of 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 9 and 12—Appropriations towards principal or interest in 1923 and 1924 under a debt decreed in 1936—If can be reopened and reappropriated under the Act.

A decree was passed on 26—9—1936 on a mortgage debt of 1920 (which itself was in consolidation of previous debts on promissory notes) for which payments towards "principal and interest" had been made in 1923 and 1924. In an application to scale down the decree,

Held, there was apparently no specific appropriation and the decree has to be scaled down on the basis of the original amounts advanced on the earliest promissory notes. Payments actually appropriated before 1—10—1937 cannot be reopened. But payment not specifically appropriated will be disregarded in calculating the amount of interest outstanding on 1—10—1937 which will be treated as discharged and the balance of the debt will bear interest from 1—10—1937 according to S. 12, *viz.*, at 5 per cent. per annum up to 22—3—1938 and thereafter at the decree rate of 6 per cent. per annum.

M. Appa Rao for Petitioner.

K. Viyanna and *K. Bhimasankaram* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
22nd August, 1940.

Doraikkannu Odayan v. Veerasami Padayachi.
C.R.P. No. 602 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 8, Explanation—Pronote executed by purchaser of hypotheca for balance due under mortgage—If covered by explanation to S. 8—Decree on the pronote against purchaser and sons forming joint family—Right of son to relief under the Act.

A purchaser of a hypotheca executed a promissory note to the mortgagee for the balance due under the mortgage. The mortgagor obtained a decree on the promissory note against the maker and his sons as members of a joint family. In an application by the son for scaling down the decree,

Held, when a member of a joint family executes a fresh document for a pre-existing liability binding on the family, but incurred on its behalf by another member such previous debt can be regarded as renewed or included in a fresh document within the meaning of the explanation to S. 8 of the Act as the debtor in each case is the same person, namely, the joint family.

The liability to the plaintiff which the applicant seeks to scale down is not a liability in respect of which a charge is provided under S. 55 (4) of the Transfer of Property Act.

A. Srirangachariar for Petitioner.

S. Swaminatha Ayyar for *M. S. Venkatarama Ayyar* for Respondent.

K.S.

King, J.
26th August, 1940.

Kesavan Chettiar v. Pakshi Ramasami Chettiar and others.
C.M.S.A. No. 118 of 1939.

Limitation Act (IX of 1908), S. 20 (2)—Execution application after three years from final decree for sale on mortgage—Mortgagee under usufructuary mortgage continuing to be in possession of some items of mortgaged property even after decree and receiving rents in lieu of interest—Execution application not saved under S. 20 (2) from bar of limitation.

An execution application was filed three years after the final decree for sale on a mortgage. The mortgagee whose mortgage was usufructuary and who had been put in possession of some items of the mortgaged properties in lieu of interest continued to receive rents even after the final decree.

Held, the receipt of rents could not come under S. 20 (2) as the rights of the mortgagee were regulated by the decree and not by the mortgage and the execution petition is not saved from the bar of limitation.

K. Bhashyam Iyengar and *T. R. Srinivasan* for Appellant.

K. S. Sankara Ayyar for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
26th August, 1940.

A. Raghupathi Iyer v Krishnachariar and another.
C.R.P. No. 1077 of 1940.

Madras Agriculturists Relief Act (IV of 1938), S 8, Explanation—Debt alleged to be in renewal of earlier debt in favour of another creditor benami for plaintiff in suit—Evidence as to benami—Admissibility.

A mortgage deed was executed on 2nd August 1937, the consideration being mainly a decree obtained by the mother of the creditor on a promissory note dated 17th January, 1932. The debtor claimed that the mother was a benamidar for the creditor and the debt was in renewal of the earlier debt in favour of the *same* creditor.

Held, evidence as to benami is not admissible and the payee and decree-holder in respect of the earlier promissory note and the plaintiff in the mortgage suit cannot be deemed to be the same creditor within the meaning of S. 8 of the Act.

S. V. Venugopalachariar and *A. C. S. Chari* for Petitioner.

Ch. Raghava Rao and *V. S. Rangaswami Ayyangar* for Respondents.

K. S.

Wadsworth and Patanjali Sastri, JJ.
28th August, 1940.

Ayipuzha Parvathi Amma *v.*
Subramaniam Pattar.
C.R.P. No. 1600 of 1938.

Madras Agriculturists Relief Act (IV of 1938), S. 23—Donee from mortgagor of one of the items of mortgaged property—Sale in execution of mortgage decree of all the items of mortgaged property in one lot—Right of the donee to re-open and scale down debt.

Out of 8 items mortgaged, the mortgagor gifted away one item to his daughter (the petitioner) and sold the other items to a stranger who executed a release deed in respect of those items in favour of the daughter conceding that they were purchased by him benami for her. The mortgagor and his daughter were impleaded in the mortgage suit and a preliminary decree was followed by a final decree for sale on 17th August, 1937, and in execution of that decree the mortgaged properties were sold in one lot on 10th March, 1938. The daughter applied to have the auction sale set aside and the decree scaled down under the Act on 9th April, 1938.

Held, the daughter was entitled to apply under S. 23 of the Act as a subsequent alienee of part of the hypotheca. I.L.R. (1939) Mad. 218, Relied on. The daughter in the circumstances is a judgment-debtor as defined in S. 2 (10) of the C. P. Code. The daughter having perfected her title by the release in her favour is entitled to have the sale of all the items set aside. Even otherwise as the sale was of all the items in one lot, the sale of all the items must be set aside and the debt scaled down.

O. T. G. Nambiar and *C. Govindan* for Petitioner.

K. Kuttikrishna Menon for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ.
28th August, 1940.

Karuppan Chettiar *v.*
Appaji Naidu and others.
C.R.P. No. 1186 of 1940.

Madras Agriculturists Relief Act (IV of 1938), S. 8, Explanation—Original debt evidenced by promissory note of A, along with X and Y—Renewal by A, along with B and C—If debt in renewal of or inclusion in a fresh document in favour of same creditor—Debt of joint family—Pronote of one member—Renewal by another member—Effect.

Renewal of a debt or its inclusion in a fresh document must be by the same debtor and when a member of a joint Hindu family executes a fresh document for a pre-existing liability binding on the family but incurred on its behalf by another member, such previous debt can be regarded as renewed or included in a fresh document within the meaning of the explanation to S. 8 of the Act as the debtor in each case is the same person, namely, the joint family, *vide* S. 3 (*i*) of the Act.

It is not necessary for the application of explanation to S. 8 that the parties to the earlier and later debts should be absolutely identical. There may be cases in which a debt due jointly and severally from *A* and *B* is included in a fresh document executed by *A* alone or cases in which a debt solely due by *A* is included in a fresh document executed by *A* and *B*. The explanation to S. 8 of the Act is applicable to cases of that sort when the applicant for scaling down is a debtor under both the instruments. Even if the later transaction in such cases cannot be said to be a "renewal" in the strict sense of the term, it would amount to an inclusion of the pre-existing liability of the common debtor in the later document.

A. C. Sampath Ayyangar for Petitioner.

Respondents not represented.

K.S.

Wadsworth, J. Gnanayutha Nadar *v.* Ponnuswamy Nadar.
31st July, 1940. C.R.P. No. 707 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 19—Court which passed the decree having a lower pecuniary jurisdiction at the time of application—Jurisdiction to scale down its decree.

Under S. 19 of Madras Act IV of 1938, it is the Court which passed the decree which has jurisdiction to amend it. This rule applies even if the Small Cause Court which passed the decree has a lower pecuniary jurisdiction at the time of the scaling down petition than it had at the time of the decree. The jurisdiction is conferred solely by S. 19 of the Act which does not impose any pecuniary limitations.

K. S. Desikan for Petitioner.

J. S. Vedamanikkam for Respondent.

K.S.

King, J. Bapalal & Co. *v.* Krishnaswami Iyer.
2nd August, 1940. C.C.C.A. No. 52 of 1939.

Defamation—Letter to Police Inspector charging criminal breach of trust against plaintiff—If absolutely privileged as sent to protect defendant's interest.

The plaintiff took some diamonds on approval in April, 1936. The defendant presented an invoice for its cost on 25th May and when by September 27th the diamonds had not been paid for, the defendant sent a letter to the Inspector of Police and the plaintiff claimed the letter to be defamatory as being equivalent to a charge against him of criminal breach of trust. Defendant claimed privilege.

Held, a complaint to a police officer from its very nature as a statement which the complainant is prepared later, if called upon to do so, to substantiate upon oath, is absolutely privileged. Case law discussed.

V. C. Gopalaratnam for Appellant.

N. Panchapagesa Ayyar for Respondent.

K. S.

Chief Justice and Horwill, J. Gopalaswami Goundar *v.*
5th August, 1940. Krishnaswami Goundar.
O.S.A. No. 26 of 1939.

Companies Act (VII of 1913), S. 235—Officer of company—If can be ordered to deliver books of the company in his possession to the liquidators.

Where books of a company, which must have some value are found to be in the possession of the manager of the company the Court has power to order them to be delivered to the liquidator and it is not necessary to pass an order for payment of a specified amount in default of delivery of such property.

P. N. Sundararajan and *D. Noronha* for Appellant.

R. Venkataraman for Respondent.

K. S.

Wadsworth, J. Periayana Nadar *v.* Sivasamy Iyer.
8th August, 1940. C.R.P. No. 1483 of 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 8 and 9—Liability on mortgage as security for future instalments of chit fund—Liability whether incurred on date of mortgage or date of default.

In respect of a mortgage executed before 1st October, 1932, as security for future instalments of a chit fund, by the mortgagor who had taken the amount of the chit in auction, default in payment of instalment was committed only after 1st October, 1932. In an application to scale down the debt,

Held, it is a present liability created on the date of the mortgage, even though it is to be discharged by future payments. 65 M.L.J. 29 at 36, referred to.

The debt has to be scaled down under S. 8.

K. S. Desikan for Petitioner.

T. S. Vaidyanatha Ayyar for Respondent.

K. S.

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Horwill, J.
9th August, 1940.

Sree Rajah Bommadevara Venkatarayulu Naidu Bahadur, Zamindar *v.* Katta Lakshmudu.

C.R.Ps. Nos. 1420, etc. of 1938.

Madras Estates Land Act (I of 1908), S. 25—Pronotes executed by ryots to stop the filing of second appeals against them by the Zamindar who was unsuccessful in both the lower courts—If without consideration—Whether unenforceable by reason of S. 25 of Estates Land Act.

Ryots had encroached on neighbouring lands of the Zamindar within 12 years of filing of suits for eviction. The suits were decided in favour of the ryots and the appeals also were dismissed on the ground that the ryots had been in long possession and the encroachment was not proved. Before the time for filing a second appeal had elapsed the ryots entered into an agreement with the landlord and executed certain promissory notes in favour of the Zamindar. In a suit on the pronotes, it was contended that there was no consideration and also that payments under it was in the nature of premia which could not be demanded of the ryots after they had been admitted into possession, as it is forbidden under S. 25 of the Madras Estates Land Act.

Held, the forbearance to file the second appeal was good consideration for the suit promissory notes. But S. 25 of the Estates Land Act has no application here at all as the amounts which the ryots agreed to pay under the promissory notes are not premia at all but amounts payable to the landlord by way of settlement of their disputes. The promissory notes are therefore enforceable.

P. Somasundaram for Petitioner.

Respondent not represented.

K.S.

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King, J.
13th August, 1940.

Sanampudi Kothandaramayya *v.* Gurrala Venkatareddi.

A.A.O. No. 306 of 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 3 (v) and 8—'Creditor'—If includes successive assignees of original creditor.

The renewal of a debt to the assignee of the original creditor is a renewal to the "same" creditor within the meaning of the Explanation to S. 8 of Madras Act IV of 1938. This definition of "creditor" extends not only to a first assignee but to any subsequent assignee also. The ultimate assignee has, in respect of the debt succeeded to, the legal right of the original creditor in exactly the same sense as the first assignee has.

K. Kotayya for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

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King, J.
14th August, 1940.

Raju Mudali *alias* Vinayaka Mudali *v.* Chinnaraju Naidu.

A.A.O. No. 150 of 1939.

Civil Procedure Code (V of 1908), O. 43, r. 1, cl. (k)—Word "suit" if includes "appeals".

In an appeal under O. 43, r. 1, cl. (k) against an order of the lower appellate Court, refusing to set aside the abatement of an appeal on the death of the

appellant, a preliminary objection was raised that no appeal lies under O. 43, r. 1, cl. (*k*) on the ground that the word 'suit' in the rule necessarily must exclude the word 'appeal'.

Held, the word "suit" includes 'appeals' (*vide* O. 22, r. 9 as interpreted by r. 11).

A.I.R. 1929 Cal. 582, not followed.

View of the Patna High Court preferred. [*Vide* 17 P. 84=A.I.R. 1938 P. 125; 1925 P. 162.]

A. C. Sampath Aiyangar for Appellant.

Ch. Raghava Rao for Respondent.

K.S.

King, J.
14th August, 1940.

Srinivasachariar *v.* Conjeevaram Hodgsonpet Dharmarakshana Nidhi, Ltd.

C.R.P. No. 1841 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 10 (2) (iii)—Applicability—Liability to 'public company' as defined in Companies Act—Rate of interest together with default interest exceeding 9 per cent.—Benefits under Act, if available to debtor.

In respect of a mortgage loan to a Nidhi, the interest stipulated was 6¼ per cent. payable every month. The bond also provided for default interest in case the interest and certain subscriptions to the Nidhi were not paid on due dates. In respect of the transaction it was found that towards a sum of Rs. 1,500, borrowed in February, 1927, a sum of Rs. 1,396-3-3 had been credited as part payment and the balance of Rs. 807-13-2 was sued for on closing of accounts in March, 1932. This was due to default interest imposed under the contract for default in payment of interest and subscriptions. The actual payments worked out at more than 9 per cent. per annum interest though the primary rate of interest was only 6¼ per cent. In an application for scaling down,

Held, as the interest works out at more than 9 per cent. per annum, S. 10 (2) (iii) of the Act cannot apply. The debtor can claim to have the debt scaled down under S. 8 of the Act. When money is borrowed and a larger sum is repaid the excess over principal must be treated as interest.

D. Ramaswami Aiyangar for Petitioner.

M. E. Rajagopalachari for Respondent.

K. S.

Wadsworth, J.
16th August, 1940.

Kannabhiran Pillai *v.* Govindaswami Pillai.

C.R.P. No. 903 of 1940.

Madras Agriculturists Relief Act (IV of 1938), S. 19—Appeal after Act came into force declaring a liability for the first time—Appellate judgment reserving debtor's right to apply under Act when there was no formal application before him—Effect on debtor's right to apply under the Act—Procedure.

An appeal was filed after Act IV of 1938 came into force against a dismissal of a suit before the Act came into force. But there was no application for scaling down before the appellate Court. But the appellate judgment reserved the defendant's right to apply for relief under Act IV of 1938. This reservation was not included in the appellate decree. Thereafter the petitioner applied to the trial Court to scale down the appellate decree under S. 19 of the Act.

Held, a decree passed after the Act came into force cannot be scaled down. *Kotayya* v. *Punnayya*, (1940) 2 M.L.J. 202, followed.

Held, further, when a liability is being declared in the appellate Court's decree for the first time and a plea is open to the defendant under the Madras Act (IV of 1938), there should be a written application raising this plea before the appellate Court and on such application the appellate Court should either

give its own decision or reserve in its decree the right to have the matter decided by the Court below. But in the absence of reservation in the appellate decree, the proper course for the defendant is to have the appellate decree brought in accordance with the judgment embodying a direction to the trial Court to deal with the application for relief under Act IV of 1938.

A. V. Viswanatha Sastri and *S. Amudachari* for Petitioner.

K. V. Srinivasa Aiyar for Respondent.

K.S.

Patanjali Sastri, J. Kona Tirumala Reddi *v.* Balireddigari Anki Reddi.
16th August, 1940. C.R.P. No. 76 of 1938.

Civil Procedure Code (V of 1908), O. 21, r. 17 (1) and (4)—Admission of execution petition—Rejection of petition under O. 21, r. 17 (1)—Material irregularity.

Where an execution petition had been admitted and the proceedings had gone forward far beyond the admission stage, the execution should be ordered subject of course to objections like limitation *res judicata,* etc., to the executability of the decree. But it is a material irregularity to reject the petition under O. 21, r. 17 (1).

P. Chandra Reddi for Petitioner.

Kasturi Seshagiri Rao for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Singaracharíar *v* Pappathi Ammal.
19th August, 1940. C.R.P. No. 656 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 3 (ii) *(a)—Vendors lien—If saleable interest in land.*

The holder of a vendor's lien in agricultural land has a saleable interest in land and is qualified to be an agriculturist under S. 3 (ii) (*a*) of Madras Act IV of 1938. *Decision in* C.R.P. No. 513 of 1939, *applied.*

K. S. Desikan and *K. Raman* for Petitioner.

C. S. Rama Rao Sahib and *A. Sundaram Aiyar* for Respondents.

K. S.

Wadsworth and Patanjali Sastri, JJ. Varadarajan Pillai *v.* Krishnamurthi.
21st August, 1940. C.R.P. No. 1088 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 8, Expl. and S. 19—Mortgage—Promissory note for interest accrued—Decree on the note—Application for scaling down of debt—Note whether a renewal of debt in favour of 'same creditors'.

A mortgage was executed for about Rs. 10,000. Some time later but before 1—10—32 a promissory note was executed by the mortgagor in favour of the son of the mortgagee for interest then due. A decree was obtained on the promissory note and in (1939) 1 M.L.J. 68 (affirmed in L.P.A. 100 of 1938) the objection of the debtor that the said decree could not be executed against the mortgaged properties under O. 34, r. 14, C.P.C., was overruled. Then he applied under S. 19 for scaling down the decree debt, in accordance with S. 8 of the Act. He contended that as the promissory note was executed in respect of interest due on the mortgage and in favour of the sons of the mortgagee it must be deemed to be a renewal of the earlier debt in favour of the 'same creditor' within the meaning of the explanation to S. 8 of the Act, and hence it must be deemed to have been discharged.

Held, (1) the promissory note was a renewal of the earlier mortgage debt;

(2) in regard to decrees based on promissory note, it is not permissible to contend that the decree-holder is a benamidar for other persons.

(1939) 2 M.L.J. 745, dissented from.

(3) the mortgagee and the decree-holder on the promissory note are not the 'same creditors' within the meaning of the explanation to S. 8 of the Act.

(1939) 2 M.L.J. (N.R.C.) 77, dissented from.

B. Desikan for Petitioner.

T. R. Srinivasan for Respondent.

K.C.

Wadsworth and Patanjali Sastri, JJ.
26th August, 1940.

Palani Goundan *v.* Muthuswami Goundan *alias* Avanashi Goundan.
C.R.P. No. 1723 of 1938.

Madras Agriculturists Relief Act (IV of 1938), Ss. 11 and 19—Decree for costs—Liability to be scaled down.

There is nothing in the Act which excludes from the scaling down operation interest on costs awarded by decrees. The sections dealing with costs are Ss. 11 and 19. When there is a decree for costs the same forms part of a decree sought to be scaled down under S. 19, and the provisions of the decree relating to interest on costs should be amended by the process laid down in Ss. 8 and 9.

S. Ramachandra Aiyar for *M. Krishna Bharathi* for Petitioner.

A. C. Sampath Ayyangar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
26th August, 1940

Suryanarayana *v.* Viswanadham.
C.R.P. No. 331 of 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 8 and 19—Hindu joint family—Promissory note falling to share of one member—Renewals in his favour—Debtor summoning account books of the joint family and notes prior to partition—Whether creditor can refuse to produce.

Where a creditor becomes entitled to a promissory note belonging to a joint Hindu family at a partition with his other coparceners and fresh promissory notes are executed in his own favour by the debtor, he cannot content himself with producing the promissory notes executed in his favour alone and is bound to produce, if available, the promissory notes anterior to the date of partition as also the account books of the joint family, to enable the debtor to establish a claim to relief under Madras Agriculturists' Relief Act.

W. S. Krishnaswami Naidu for Petitioner.

K Bhimasankaram for Respondent

K. S.

Wadsworth and Patanjali Sastri, JJ.
28th August, 1940.

Poovanalingam Pillai *v.* Nagaratnam Pillai and others.
C.R.P. No. 1733 of 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 8, 9 and 19—Pronote of 23—1—1924 endorsed to plaintiff on 26—1—1933—Liability of the endorser to plaintiff—If can be treated as debt incurred on original promissory note.

In a suit against the endorser of a promissory note of 23rd January, 1924, which was endorsed to the plaintiff on 26—1—1933, a decree was passed against both. The endorser applied for scaling down.

Held, the liability of the endorser was a personal liability the basis of which was his endorsement though the quantum of liability was the original debt of the pre-existing promissory note and the debt is one incurred after 1—10—1932 and must be scaled down under S. 9 of the Act.

I.L.R. (1939) Mad. 218, distinguished.

V. Ramaswami Ayyar for Petitioner.

K. V. Srinivasa Ayyar for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
29th August, 1940.

Puranam Yegnanarayana *v.* Desiboyana Venkatayya.
C.R.P. No. 346 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 10 (2) (ii)—Payment of price and execution of sale deed in favour of X—Agreement by X before registration to have the land conveyed by the vendor to Y direct—Y paying cash and executing a promissory note to X—Registered sale executed by vendor in favour of Y—Y executing a mortgage next day in favour of X to cover the amount due on the promissory note—Liability under—If excluded by S. 10 (2) (ii) of Act IV of 1938.

A sale deed in respect of land was executed in favour of *X* who paid the price to the vendor. But before the registration of the sale deed *X* entered into an agreement to have the land conveyed by the vendor to *Y* direct. Accordingly *Y* paid some cash and executed a promissory note to *X*. The sale deed in favour of *Y* was duly registered and the next day *Y* executed a mortgage in favour of *X* to cover the amount due on the promissory note executed the previous day. An application to scale down this debt was resisted on the ground that this was a liability excluded by S. 10 (2) (*ii*) of Act IV of 1938.

Held, X was not the seller of the property for he had no interest which he could convey. The title remained with the vendor at the time of the transfer to *Y* and though the vendor was under an obligation to *X* that obligation did not have the effect of vesting any title in the petitioner. *X* cannot therefore be regarded as a seller and the amount due from *Y* will not carry any charge such as if provided in S. 55 (4) (*b*) of the Transfer of Property Act.

59 Mad. 910 (P.C.) and 50 Mad. 193 distinguished.

The liability therefore is not excluded from the scaling down provisions by the operation of S. 10 (2) (*ii*) of Act IV of 1938.

V. S. Narasimhachar for Petitioner.

P. Satyanarayana Rao for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ.
30th August, 1940.

Sevugan Chettiar *v.* Ranganatham Mudaliar.
O.R.P. No. 1756 of 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 8 and 12—Debt scaled down under S. 8 (5)—From what date to carry interest.

A debt was contracted on 14th September, 1932 and the decree thereon was passed on 21—12—1936. It was scaled down to Rs. 298-14-11 as being the amount which was short of twice the amount of the principal.

Held, reading S. 8 as a whole, the date mentioned in sub-S. (1) is the date up to which all debts falling under that section have to be scaled down and the balance due after scaling down should carry interest from 1—10—1937 at the rate mentioned in S. 12 (here the decretal rate of 6 per cent. per annum).

T. S. Vaidyanatha Ayyar for Petitioner.

V. S. Rangachari for Respondent.

K.S.

Wadsworth, J.
1st August, 1940.

Veeramuthu Padayachi *v.* Sivasankara Mudaliar and others.

C.R.P. No. 1104 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 19 and 20—Stay of execution for two months—If extends 60 days period within which petition under S. 19 may be filed—Order if revisable.

The error of the District Munsif in disposing of the stay application under S. 20 by noting that execution is stayed for two months will not extend the period from 60 days to two months, within which an application under S. 19 may be filed. Such error though a ground for review is not a ground for revision.

K. S. Desikan for Petitioner.

K. Narasimha Aiyangar and *G. N. Chari* for Respondents.

K. S.

Patanjali Sastri, J.
1st August, 1940.

Sankaranarayana Iyer *v.* Paramasivam Pillai.

C.R.P. No. 710 of 1937.

Civil Procedure Code (V of 1908), S. 55 (4)—Security bond under—Surety—If entitled to be released from his bond at his pleasure.

A security bond, in conformity with S. 55 (4) of the Code, provided that the security deposited by the surety should be realised if the judgment-debtor did not apply to be declared an insolvent within one month or did not appear when called upon to do so in the proceedings on such application or in execution of the decree. After the judgment-debtor applied to be, and was adjudged an insolvent and when those proceedings were still pending, the surety applied to be discharged offering to produce the judgment-debtor, as he did not like to continue as surety any longer.

Held, a person who becomes a surety under S. 55 (4), C. P. Code, cannot claim to be released from his obligation at his pleasure.

28 Mad. 161 applied; 1934 Lah. 962 dissented from; 1935 Mad. 543 referred.

R. Ramamurthi Aiyar for Petitioner.

Respondent not represented.

K. S.

Burn and Mockett, JJ.
7th August, 1940.

Sutapilli Venkataswami *v.* Sutapilli Ramamurthi.

A.A.O. No. 369 of 1938.

Civil Procedure Code (V of 1908), S. 39 and O. 21, r. 5—Court to which decree is transferred for execution—Absence of application by decree-holders to Court, which passed decree and absence of certificate of partial execution or non-execution—Jurisdiction of transferee Court to execute.

In 1922 the territorial jurisdiction over the properties against which execution was sought was transferred to the District Court, Vizagapatam. In 1935 or 1936, the jurisdiction was again transferred from District Court, Vizagapatam, to Sub-Court, Chicacole. In July, 1933, an execution petition was filed in the Sub-Court, Vizagapatam, for attachment and sale of properties then situate within that Court's jurisdiction. There was however no application for transfer of decree to the proper Court for execution. In 1935, the decree-holder filed an original petition to the District Court, Vizagapatam requesting the District Judge to withdraw the execution petition of 1933 to the file of the District Court, which at that time had jurisdiction over the properties. But before the District Judge passed orders he ceased to have jurisdiction and so the application was dismissed by the District Judge. On 20th July, 1936, the Sub-Judge, Vizagapatam, *suo motu,* ordered the records in the Execution Petition to be sent to Sub-Court, Chicacole, for execution. At Chicacole the Execution Petition was given a new number.

The judgment-debtors took objection to the jurisdiction of the Court to proceed with the execution.

Held; where a decree is sent *suo motu* by the Court which passed the decree to another Court for execution (the other Court not being a subordinate Court) the transferee Court has no jurisdiction to execute the decree in the absence of an application from decree-holders for such transfer and in the absence of certificate of partial execution or non-execution from the Court which passed the decree.

Kasturi Seshagiri Rao for Appellant.
V. Govindarajachari for Respondent.

K. S.

The Chief Justice and Horwill, J.
16th August, 1940.

Pachiammal *v.* The Hindustan Co-operative Insurance Society, Ltd.
O.S.A. No. 12 of 1939.

Letters Patent, Cl. 12—Life Insurance Company with Head Office at Calcutta—Branch Office organising business at Madras—Whether the company "carries on business" at Madras.

A life insurance policy was effected in the Chingleput District with the respondent company who had their Head Office at Calcutta (where alone contracts were concluded and payments were directed to be made) and a Branch Office at Madras which had a large establishment and did considerable business in canvassing policies of insurance. A suit under a policy of Insurance was filed at Madras.

Held (affirming the decision of *Mockett, J.*), that the company could not be held to carry on business at Madras.

English and Indian Law reviewed.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *K. S. Rajagopala Aiyangar* for Appellant.
T. R. Venkatarama Sastriar, A. V. Seshayya and *S. Ramachandra Aiyar* for Respondents.

K. S.

Patanjali Sastri, J.
16th August, 1940.

Venkatachalam Chettiar v. Subramanian Chettiar.
C.R.P. No. 77 of 1938.

Hindu Law—Junior members of family managing business and incurring debts under power of attorney—When personally liable.

Unless the evidence leads to the inference that a junior member of a joint family became a partner in the business of his father conducted by him under a power of attorney he cannot be made personally liable for debts contracted under the power of attorney.

(1938) 2 M.L.J. 944 and (1940) 1 M.L.J. 469, referred to.

C. Padmanabha Aiyangar for Petitioner.
N. Viswanatha Aiyar and *N. V. Nagaraja Aiyar* for Respondent.

K.S.

Horwill, J.
16th August, 1940.

Bappanna Rukminamma *v.* Maganti Venkata Ramdas.
C.R.P. No. 1673 of 1938.

Madras Agriculturists Relief Act (IV of 1938), S. 4 (e)—Applicability—Registered society formed under Societies Registration Act—If corporation excluded from operation of Act IV of 1938.

A society formed under the Societies Registration Act is a corporation and a debt due to such a society cannot be scaled down.

D. Suryaprakasa Rao for Petitioner.
A. Lakshmayya for Respondent.

K.S.

The Chief Justice and Horwill, J.
20th August, 1940.

The State Aided Bank of Travancore, Ltd. *v.* The Indian Bank, Ltd.
O.S.A. No. 54 of 1938.

*Government promissory notes—Transferable by mere endorsement—Notes endorsed to broker—*Bona fide *holder for value from broker—Rights.*

Brokers used the securities of a constituent for the purpose of securing their overdraft. The Government promissory notes were endorsed in blank and the respondent Bank advanced moneys on them.

Held, the brokers were to be regarded as holders in due course and the respondent Bank who took them in good faith and for valuable consideration obtained a valid title though the brokers had no title. A letter accompanying the deposit of the notes with the respondents stating that they were "received from the chairman of the State Aided Bank" did not put the respondents on enquiry.

C. Krishnaswami Aiyar instructed by *King* and *Partridge* for Appellants.

The Advocate-General (Sir A. Krishnaswami Aiyar), S. Panchapakesa Sastri and *K. R. Krishnaswami* for Respondent.

K. S.

King J.
20th August, 1940.

Maharaja of Cochin *v.* Thupran.
A.A.A.O. No. 68 of 1939.

Res judicata—Applicability to execution proceedings—Order for sale in execution and proclamation—Claimant objecting to sale of item—Failure to substantiate at hearing—Final order for sale—Subsequent application to exclude property from sale—Barred by Res judicata.

Sale was ordered and notice of the proclamation of sale was issued under O. 21, r. 66 to the respondent (a claimant) who filed objections contending that the site in question was not included in the boundaries and that respondent had to be paid for buildings on the site as improvements. As respondent made no attempt to substantiate his contentions the sale was ordered to be held on 27th February 1935. There was no sale on that day and after a fresh proclamation 5th June was fixed for sale. On 4th June, 1935, the respondent applied under S. 47, C. P. Code, for an order excluding the property in dispute from the sale.

Held, the application is barred by res judicata.

V. Radhakrishnayya and *K. P. Ramakrishna Aiyar* for Appellant.

B. Poker for Respondent.

K. S.

King, J.
22nd August, 1940.

Puligada Venkatasubba Rao *v.* Yellapragada Sivaramayya.
A.A.O. No. 90 of 1939.

Madras Hindu Religious Endowments Act, S. 73—"Excepted temple"—Scheme for administration—Jurisdiction to frame.

S. 73 must be strictly construed. In spite of the amendments to the section consequent on 57 Mad. 315 and 57 Mad. 362 enlarging jurisdiction it still does not include any suit to settle a scheme. The reason appears to be obvious, *viz.,* that provision has already been made for the framing of schemes in the case of excepted temples by Ss. 62, 63 and 65 of the Act.

V. Rangachari for Appelllant.

P. Somasundaram for Respondent.

K. S.

Pandrang Row and Abdur Rahman, JJ.
23rd August, 1940.

Arunagiri Mudali *v.* Radhakrishna Aiyar.
App. No. 254 of 1937.

Suit on mortgage—First mortgagee purchasing a part of the hypotheca in execution of decree on puisne mortgage in his own favour—Rights of parties.

A first mortgagee who had become a purchaser of a part of the hypotheca in Court sale in execution of a decree on a puisne mortgage in his own favour, filed a suit for the full mortgage amount due on his first mortgage against the other items of property. The defendants pleaded that they were liable to pay only proportionate part of the amount due as the properties purchased by the mortgagee would themselves be liable to contribute rateably, and claimed that the value of the properties as on the date of the mortgage must be taken as the basis for working out the ratio. The plaintiff contended that in any event the value as on the date of purchase should be taken, as a mortgagee would be entitled to the benefit of the subsequent improvements on the hypotheca which will be an accretion to the security.

Held, that the accretion only augmented the security and did not affect the quantum of the amount claimable by the plaintiff.

Held, further, that though S. 82 of the Transfer of Property Act did not directly apply, as this is not a suit for contribution, still the right of parties should be adjusted in the light of the principles underlying S. 82.

43 Mad. 372 (F.B.) followed.

Held, also, that for the purpose of calculating the proportionate liability the value of the property as on the date of mortgage should be taken.

C. Padmanabha Aiyangar for Appellant.

S. Panchapakesa Sastriar, V. N. Srinivasa Rao and *T. E. Ramabhadrachariar* for Respondent.

K. S.

Patanjali Sastri, J.
30th August, 1940.

Subbayya Nadar *v.* Anjaneyulu.
C.R.P. Nos. 861 and 1184 of 1937.

Civil Procedure Code (V of 1908), O. 44, r. 1—Application for leave to appeal in forma pauperis*—If can be rejected without hearing the applicant or giving him an opportunity of being heard.*

An application for leave to appeal in *forma pauperis* cannot be rejected without hearing the applicant or giving him an opportunity of being heard. Case-law discussed.

The reference in O. 44, r. 1, to a 'perusal' by the Court of the documents specified is not sufficient to justify a departure from the ordinary *cursus curiae.*

K. Umamaheswaram for Petitioner.

K. Kuppuswami for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ.
3rd September, 1940.

Soolapani Moopil Variar *v.* Vayankara Thekka Vettil Veloor.
C.R.P. No. 611 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (ii), Proviso D and S. 15—Kanom—Suit for redemption—Kanom held by tarwad *which was a jenmi paying more than Rs. 500 as land revenue at the time of suit—Subsequent partition assigning kanom right to one* tavazi *which paid less than Rs. 500 as land revenue—Such* tavazhi *entitled to benefit of S. 15 of Act IV of 1938.*

After a suit for redemption of a kanom held by a *tarwad* which was a jenmi paying more than Rs. 500 as land revenue there was a partition by

which the kanom was allotted to one *tavashi* which paid less than Rs. 500 as land revenue. In an application for scaling down by the *tavashi*,

Held, the *tavashi* was under a liability to pay the rent such as would entitle it to claim the benefits of S 15 of Act IV of 1938.

I.L.R. 1939 Mad. 218 followed.

(1940) 2 M.L.J. 451 referred to.

On payment of the arrears of rent as scaled down the *tavashi* is entitled to the benefits under Ss. 22 to 24 of the Malabar Tenancy Act.

P. Govinda Menon for Petitioner.

A. P. Kuttisankara Menon for Respondent.

K. S.

The Chief Justice and Horwill, J.
3rd September, 1940.

Nedungadi Bank, Ltd., Madras *v.* Doraikannu Ammal.
O.S.A. No. 47 of 1939.

Surety—Mortgage by surety for overdraft current account of principal—If discharged by earliest payments by principal debtor—Rule in Clayton's case *—Applicability.*

Where on the facts, the mortgage by a surety is a continuing guarantee enforceable against the ultimate balance due on an overdraft current account, the rule in *Clayton's case*, is not applicable and the mortgage by the surety cannot be deemed to have been discharged by the earliest payments made by the debtor.

K. Rajah Ayyar, V. C. Veeraraghavachariar and *P. S. Ramaswami Iyengar* for Appellants.

C. Padmanabha Iyengar and *T. V. Ramanathan* for Respondent.

K.S.

King, J.
3rd September, 1940.

Ramanathan Chettiar *alias* Krishna Chettiar *v.* Kuppan Chettiar *alias* Ranganathan Chettiar.
C.M.S.A. No. 41 of 1939.

Civil Procedure Code (V of 1908), O. 21, r. 2—Application for entering satisfaction—If can be withdrawn by the decree-holder.

There is nothing in O. 21, r. 2, preventing the Court from allowing a decree-holder to withdraw his application for recording satisfaction of the decree so long as satisfaction had not been recorded by the Court.

T. M. Krishnaswami Aiyar and *T. S. Venkatarama Aiyar* for Appellant.

S. Panchapagesa Sastri and *P. J. Kuppanna Rao* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
4th September, 1940.

Varadarajaperumal Pillai *v.* Palanimuthu Goundan.
C.R.P. No. 1679 of 1938 and C.M.S.A. No. 239 of 1938.

Madras Agriculturists Relief Act (IV of 1938), S. 10 (2) (ii)—Promissory note executed for balance of purchase price of land—Indorsee of promissory note—Liability—If excluded by S. 10 (2) of the Act as one for which a charge is provided by S. 55 (iv) (b) of the Transfer of Property Act.

In February, 1923, a promissory note was executed for the balance of purchase price of certain lands. This promissory note was twice renewed and the last renewed note of 1932 was assigned in 1936 to the plaintiff by endorsement. The plaintiff obtained a decree on the promissory note. In an application for scaling down this debt the question arose whether S. 10 (2) (ii) of Act IV of 1938 excluded the operation of the scaling down provisions to the liability as one in respect of which a charge was provided under S. 55 (iv) (b) of the Transfer of Property Act.

(Assuming that 44 Mad. 965 is correct, though there is some conflict of authority.)

Held, that the intention of the Legislature was to specify those classes of liabilities in respect of which the scaling down provisions of Act IV of 1938 were not to operate and that the exclusion of liabilities of these categories was not to depend on the actual subsistence of the charge but on the question whether in the beginning the liability was one belonging to that category in respect of which the Transfer of Property Act provided a charge. The applicability of S. 10 (2) (*ii*) of Act IV of 1938 is not affected by the assignment of this liability.

V. Ganapathi Ayyah for Petitioner.

S. S. Ramachandra Ayyar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
4th September, 1940.

Amad Koya *v.* Appu and another.
C.R.P. No. 1632 of 1938, etc.

Madras Agriculturists Relief Act (IV of 1938), S. 15—Arrears of rent for faslis prior to 1345 due from tenant assigned by jenmi to third person—If can be deemed to be discharged by tenant depositing rent for faslis 1346 and 1347—Malabar Tenancy Act, S. 3 (k) and (j)—'Jenmi' or Intermediary'—If includes assignee of right to collect rents.

Under S. 15 of Act IV of 1938 only arrears of rent payable to a jenmi or intermediary could be deemed to be discharged by depositing the rent for faslis 1346 and 1347 but the liability to an assignee of such arrears of rent could not be scaled down. The words 'jenmi' and 'intermediary' in S. 3 (*k*) and (*j*) of the Malabar Tenancy Act do not include an assignee of the right to collect rents though under the corresponding provision S. 3 (5) of Madras Estates Land Act, the term 'landholder' does include a person entitled to collect.

K. Kuttikrishna Menon for Petitioner.

K. P. Raman Menon for Respondents.

K. S.

Lakshmana Rao, J.
4th September, 1940.

Arunachala Mudaliar and others, Accused.
CrI.R.C. No. 85 of 1940 and
CrI.R.P. No. 82 of 1940.

Indian Police Act (V of 1861), Ss. 30, Cl. (2) and 32—Licence for taking procession—Violation of condition—Persons other than licensee, if guilty under S. 32.

A licence under S. 30, Cl. (2) of the Indian Police Act for taking a procession contained a condition that music of all description should be stopped within a distance of 50 yards on either side of any mosque. The condition was violated by the licensee and others who were not licensees.

Held, all the persons who violated the condition are guilty under S. 32 of the Indian Police Act, especially as they were aware of the conditions of the licence. The person violating the condition need not be the licensee.

K. S. Jayarama Iyer and *G. Gopalaswami* for Petitioners.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Lakshmana Rao, J.
4th September, 1940.

K. Sannayya, Accused.
CrI.R.C. No. 551 of 1940 and
CrI.R.P. No. 524 of 1940.

Government of India Act, 1935, S. 270 (1)—Postman charged with offence under Ss. 409, 467 and 471—Indian Penal Code, for misappropriating amount of money order entrusted to him by forging thumb impression of payee—Postman—If person employed in connection with the affairs of the Government of India—Consent of Governor-General for prosecution—Necessity.

A postman misappropriated the amount of a money order entrusted to him by forging the thumb impression of the payee. He was charged with offences under Indian Penal Code, Ss. 409, 467 and 471.

Held, the forged document was used in the execution of the duty of the postman, a person employed in connection with the affairs of the Government of India. The consent of the Governor-General is therefore necessary for the prosecution for the offence under S. 471, Indian Penal Code, but there is no bar to the trial of the offence under Ss. 409 and 467, Indian Penal Code.

K. S. Jayarama Aiyar and *K. Gopalaswami* for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Wadsworth and Patanjali Sastri, JJ.
10th September, 1940.

Lakshmana Iyer *v.* Ramaswami Naicken (minor).
C.R.P. No. 1194 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 10 (2) (ii)—Mortgage to vendee for purchase price—Other property along with property purchased mortgaged—If contract to contrary excluding change under Transfer of Property Act, S. 55 (iv) (b)—Debt not liable to be scaled down.

Property was sold to the second defendant and the father of the other defendants, the vendee executing a mortgage for the full amount of the sale price and giving as security not only the property sold but also some other property. It was provided that the principal was payable after five years but should carry interest from date of the bond. In an application to scale down the debt,

Held, the terms of the mortgage do not constitute a contract to the contrary so as to exclude the statutory charge under S. 55 (iv) (*b*) of the Transfer of Property Act, and by reason of S. 10 (2) (ii) of Act IV of 1938, the debt is excluded from the scaling down provisions.

31 Cal. 57, followed.

35 M.L.J. 304, referred to.

A. C. Sampath Aiyangar for Petitioner.

N. Somasundaram for Respondent.

K. S.

The Chief Justice and Horwill, J.
10th September, 1940.

The Official Assignee, Madras *v.* Hukumchand Khimsura.
O.S.A. No. 13 of 1940.

Pledge—Deposit of insurance policies accompanied by a letter setting out the policies as articles pledged—If creates a valid lien in favour of creditor.

Mere fact of deposit of insurance policies by way of pledge created no lien in favour of the creditor. A letter which set out the policies as articles pledged was merely evidence of the deposit and did not amount to a valid assignment of the policies and conferred no rights on the creditor.

K. V. Ramachandra Aiyar and *S. Tyagaraja Aiyar* for Appellant.

A. V. Seshayya for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ.
10th September, 1940.

Kannan Nambiar *v.* Subramaniam Pattar.
C.R.P. No. 257 of 1939.

Madras Agriculturists Relief Act (IV of 1938)—Mortgage to stake-holder of chit fund for payment of Rs. 9,000 in 18 instalments of Rs. 500 each—Suit on mortgage—Compromise decree for payment of

smaller amount in five instalments—Liability of decree to be scaled down—Date on which liability to be regarded as incurred.

A mortgage bond in favour of the stakeholder was executed on 16th July, 1923, for payment of Rs. 9,000 in 18 instalments of Rs. 500, each payable every eight months in respect of future subscriptions for one ticket in a chit fund. A suit on the mortgage was compromised, the plaintiff agreeing to accept payment of a smaller sum in five instalments in full satisfaction of the claim, and a decree in terms was passed on 14th April, 1936.

In an application for scaling down the compromise decree, *held* that the decree is liable to be scaled down with reference to the principal sums originally or subsequently advanced.

(1940) 2 M.L.J. 293 followed.

I.L.R. 1939 Mad. 218 and C.R.P. No. 602 of 1939, C.R.P. No. 1483 of 1939 referred to.

The liability must be considered to have been incurred on the date of the mortgage bond and the decree scaled down under S. 8 of the Act.

P Govinda Menon for Petitioner.

K. Kuttikrishna Menon for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ.
11th September, 1940.

Abdur Khadar and others
v. Subramania Pattar.
C.R.P. No. 16 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 10 (2)—Usufructuary mortgage and lease back to mortgagor—Rent payable if can be treated as interest and scaled down.

Where there is a usufructuary mortgage and a lease back to the mortgagor, though both form part of one and the same transaction, the rent stipulated could not be regarded as interest on the mortgage amount and scaled down under the Act.

P. Govinda Menon for Petitioners.

K. Kuttikrishna Menon for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ.
11th September, 1940.

Vasudevan Nambudri
v. Raman Nambudri.
C.R.P. No. 824 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 15—"Panayam purappad"—Possessory mortgage—Surplus of income from property repayable to mortgagor—If rent—Applicability of S. 15.

A possessory mortgage styled *Kaivasam panayam* under which the mortgagee was to appropriate, out of an estimated yield of 490 paras of paddy 200 paras in lieu of interest on the mortgage money, pay 60 paras for assessment on the property and pay the balance of 230 paras to the mortgagor as '*panayam purappad*' in two instalments during the harvest season. In case of default in payment of '*panayam purappad,*' provision was made for its application together with fixed interest in payment of the mortgage money calculating the value of paddy at current rate. A charge was provided on the standing crops for the arrears of *purappad* after default in payment. A purchaser of the mortgagee's rights in execution sale claimed the benefit of S. 15 of Act IV of 1938 depositing the *purappad* for 1937-1938. *Held,* the amount which had to be paid as *panayam purappad* is not 'rent' in the proper sense of the term and does not fall within the mischief of S. 15 of Madras Act IV of 1938.

2 Mad. 187 and 57 M.L.J. 800 relied on.

P. Govinda Menon for Petitioner.

K. V. Gopalakrishna Nair for *D. H. Nambudripad* for Respondent.

K. S.

Wadsworth, J.
1st August, 1940.

Chavukola Kottiah *v.* Venkatakrishniah.
C.R.P. No. 1166 of 1939.

Madras Agriculturists Relief Act (IV of 1938)—Application for scaling down—Dismissal—Fresh application for same relief barred by res judicata.

When a previous application for scaling down had been dismissed for default and a restoration petition had also been dismissed a fresh application for the same relief is barred by the principle of S. 11 of the C. P. Code.

T. Rajagopalan for Petitioner.

V. G. Krishnamurthy for Respondent.

K.S.

Krishnaswami Aiyangar, J.
6th August, 1940.

Pyda Suryanarayanamurthi *v.* Municipal Council, Cocanada.
C.R.P. No. 1259 of 1937.

Madras District Municipalities Act (V of 1920), S. 83—Premises rented out for use for educational purposes—If exempted from property tax.

A portion of a house was rented by the Municipal Council and used for accommodating a school run by the Municipal Council. Exemption from liability to property tax in respect of the house was claimed under S. 83 of Madras Act V of 1920.

Held, where the owner leases out property and collects full rent, he is not entitled to exemption from liability to property tax. The word "used" in the section must be read in the sense "used by the person who is primarily liable for the tax" or in other words the "owner".

P. Somasundaram for Petitioner.

B. V. Subramanyam for Respondent.

K.S.

King, J.
12th August, 1940.

Kanchala Ramamurthy *v.* Namna Bangaramma.
C.M.S.A. No. 207 of 1938.

Practice—Attachment—Decree attached set aside on appeal—Effect—New decree passed—If attachment revived.

When a decree is attached and that decree is set aside on appeal the attachment must automatically come to an end. Such an attachment cannot revive when a new decree is passed, without any action by the attaching creditor.

A.I.R. 1933 Rang. 346, not followed.

50 M.L.J. 79, referred.

M. S. Ramachandra Rao for Appellant.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondent.

K.S.

King, J.
13th August, 1940.

Govindarajulu Naidu *v.* Gopalasami Chetty.
C.R.P. Nos. 722 & 723 of 1937.

Transfer of Property Act (IV of 1882), S. 76—Usufructuary mortgagee from lessee—If can be proceeded against by the landlord for rent or jodi due on that property.

Section 76 of the Transfer of Property Act, deals only with the relative rights and duties of the mortgagor and mortgagee and cannot confer on a landlord the right to proceed directly against the usufructuary mortgagee of his lessee for rent or jodi due to him.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Petitioner.

Alladi Ramaswami Aiyar for Respondent.

K.S.

N R C

Wadsworth, J.
15th August, 1940.

Chimakurtti Seshayya *v.* Hirachand Chunnilal Firm.
C.R.P. No. 592 of 1939.

Provincial Insolvency Act (V of 1920), S. 72—Insolvent obtaining credit without disclosing bankruptcy—Order directing prosecution for offence—Appealability—Order on appeal—Revision—Earlier proceedings for prosecution stopped—If bar to subsequent proceedings for prosecution. Discharge of insolvent pending appeal against order directing prosecution—If makes the proceedings for prosecution void.

Substantially the provisions of S. 72 (2) of the Provincial Insolvency Act are analogous to those of S. 476 of the Criminal Procedure Code, and the Insolvency Court should give notice to the insolvent before directing his prosecution and a decision directing the prosecution for the offence of obtaining credit without disclosing his bankruptcy is a decision against which the insolvent as the aggrieved party has a right of appeal similar to that provided by S. 476 of Criminal Procedure Code. The correctness of the dismissal of such an appeal by the District Judge can be canvassed in revision.

A.I.R. 1933 Nag. 9, referred.

Where the Court had declined to proceed with a prosecution under S. 72 owing to the absence of the person who laid the information and subsequent proceedings are taken when the Court had before it more materials no question of *res judicata* arises and if it is a mere question whether the order of the Court is wise or unwise it is not a matter that should be gone into in revision. Where a prosecution is launched and the appellate Court declines to stop it the discharge of the insolvent before the appeal was dismissed cannot make those proceedings void.

K. Kameswara Rao for Petitioner.

K. Bhimasankaran for Respondents.

K.S.

King, J.
30th August, 1940.

Subba Naicker *v.* Savarimuthu Pillai & others.
A. A. A. No. 44 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 23—Scope—Sale in execution—When can be set aside.

In S. 23 the clause "notwithstanding the sale has been confirmed" in no way affects the main provisions of the section and obviously cannot be used to introduce any *new* provisos, *e.g.*, "that a sale shall not have been followed by delivery of property". The legislature recognises that the new enactment is at variance with the Limitation Act and Civil Procedure Code. Interpretation of S. 23 is an important matter coming within S. 115 of C.P. Code though no first appeal lies against the District Munsif's order on the section.

A. Swaminatha Aiyar and *S. Thiagaraja Aiyar* for Appellant.

R. Ramamurthi Aiyar for Respondent.

K. S.

The Chief Justice and Horwill, J.
4th September, 1940.

Official Assignee of Madras *v.* Natesa Achari.
O.S.A. No. 58 of 1939.

Limitation Act (IX of 1908), S. 19—Usufructuary mortgage—Mortgagors covenanting 'If we commit default you shall bring property to sale, take principal and interest and pay earlier mortgagee if any debts incurred for benefit of the family have to be paid to him in respect of the property and pay the balance to us"—How far acknowledgment of earlier mortgage debt to save limitation.

S, executed a mortgage of his property to *M*, on 9th August, 1921, to secure Rs. 5,000 and he executed on 6th January, 1923, a second mortgage of the property to *M*, to secure a further advance of Rs. 1,000. On 4th July, 1924, *S* executed a usufructuary mortgage of the property in favour of *R* for Rs. 1,000 in which the following passage appeared: "If we commit default in respect of any condition you shall bring the said property to a public or private sale take the principal and interest and also the auction expense as per account, pay *M* if any debts incurred for the benefit of our family has to be paid to him in respect of the said property and pay the balance if any to us".

Held, there is no acknowledgment of the earlier mortgage debt within the meaning of S. 19 of the Limitation Act. For S. 19 to apply the words used must be words which clearly indicate an acknowledgment of liability of the particular debt.

T. V. Srinivasan for Appellant.

K. S. Rajagopala Aiyangar, K. Govindan and *V. S. Rangachari* for Respondent.

K.S.

King, J.
6th September, 1940.

Udumbanthala Nalu Purapatti Mammad *v.* Vyagaram Narayana Pattar and others.
C. M. S. A. No. 51 of 1940.

Madras Agriculturists Relief Act (*IV of* 1938), *S.* 3 (ii), *Proviso D—Person paying as* jenmi *less than Rs.* 500 *land revenue, paying other land revenue as ryotwari pattadar which together exceeded Rs.* 500—*Effect.*

There are no words in the Proviso D to S. 3 (*ii*) restricting the land revenue payable by a *jenmi* to the revenue payable only on the land so held by him and taking the clause in its plain meaning where the total payments by a *jenmi* to the government (including amounts paid as ryotwari pattadar) on account of land revenue exceeds Rs. 500. Proviso D to S. 3 (*ii*) is applicable and excludes him from being an agriculturist under the Act.

K. Kuttikrishna Menon for Appellant.

O. T. G. Nambiar for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
11th September, 1940.

Venkatammal *v.* Ramaswami Aiyar.
C. R. P. No. 61 of 1939.

Madras Agriculturists Relief Act (*IV of* 1938), *S.* 8—*Explanation*, 10 (2) (ii), *and* 19—*Purchaser of hypotheca—Suit on the mortgage—Compromise decree—Liability of purchaser—If personal—Liability if excluded from scaling down provisions under S.* 10 (2) (ii)—*Liability one in renewal of original mortgage—If execution costs also included in costs provided for in Ss.* 11 *and* 19.

A mortgage was executed by *S* on 16—8—1917 in favour of the plaintiffs. On 13—12—1923 the wife and daughter of *S* (defendants 1 and 2) executed a fresh mortgage in renewal of the earlier one by *S*. On 27—12—1933 defendants 1 and 2 sold the hypotheca to the 4th defendant who undertook to discharge the mortgage by payment of Rs. 2,500 out of the purchase price. Then a suit on the mortgage resulted in a compromise decree by which defendants 2 and 4 were to satisfy the decree by paying Rs. 1,500 by 24th August, 1935 and Rs. 2,050 by 16th July, 1936 but in default of such payments the decree was to be a final decree for the full plaint claim (Rs. 4,348—8—0) with interest and costs. Towards the decree Rs. 500 was paid on 1—8—1936, Rs. 1,000 on 18—7—1936 and Rs. 1,000 on 5—1—1937.

The 4th defendant filed an application under S. 19 of Act IV of 1938 for scaling down.

Held: (1) The liability sought to be scaled down is not the liability of the 4th defendant to her vendors but the liability to the mortgagee and consequently S. 10 (2) (ii) of Act IV of 1938 has no applicability. (2) The liability under the compromise decree was a renewal of the previous mortgage liability. (3) When both the original mortgagor and his purchaser are agriculturists, the purchaser can claim to have the debt scaled down on the basis that the mortgage debt for which the purchaser of the hypotheca became liable is itself a renewal of an earlier debt in favour of the same creditor. (4) The provisions of S. 11 like those of S. 19 relate only to costs originally decreed and do not cover costs of execution.

V. C. Veeraraghavachariar for Petitioner.

K. V. Ramachandra Aiyar for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ. Ithiri Nambudri *v.* Sankunni Nair.
12th September, 1940.

C. R. P. No. 2190 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 15—Assignee of a portion of kanom *allotted to* tavazhi *on partition—If entitled to benefit under S. 15—Deposit of rent to include arrears of revenue payable by* kanomdar *for those faslis.*

An alienee of the whole of the tenant's interest in a portion of his holding is a person who is liable to pay rent in respect of that portion and provided he is an agriculturist he is entitled to deposit the arrears of the holding for faslis 1346 and 1347 and obtain the benefits of S. 15 of Act IV of 1938. A deposit of rent by a tenant under S. 15 must include any arrears of Government revenue payable by the kanomdar in respect of those faslis.

K. P. Ramakrishna Iyer and *D. H. Nambudripad* for Petitioners.

P. Govinda Menon for Respondents.

K. S.

Wadsworth and Patanjali Sastri, JJ. Ramadoss Reddi *v.*
13th September, 1940. .. Munisami Reddiar.

C. R. P. No. 1454 of 1939.

Madras Agriculturists Relief Act (IV of 1938)—Ss. 8, 15 and 19—Applicability to decree on promissory note executed for arrears of rent.

Where a decree is passed on a promissory note executed for arrears of rent, the decree is a decree for a debt and not for rent. The decree will not fall under S. 15 but under Ss. 9 and 19 of Act IV of 1938.

I.L.R. 55 Mad. 880, applied.

V. V. Ramadurai for Petitioner.

T. R. Srinivasan for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ. Pandiri Sarweswara Rao *v.*
13th September, 1940. Mathuri Umamaheswara Rao.

C. R. P. No. 1020 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 8 (ii), Provisos B and C—Assessment to profession-tax—Criterion for applying Proviso B—Date of assessment or period of assessment—Some properties assessed in name of husband and others in name of wife—Applicability of Proviso C to S. 8 (ii).

The assessment to profession-tax of a debtor was actually made on 15—1—1938 but it was retrospective and covered the half year beginning 1—4—1937:

Held, S. 137-B of the City Municipal Act contemplates the assessment being retrospective but does not provide that the date of assessment shall

be deemed to fall within the period to which the assessment relates. It is impossible to read the words of Proviso B to S. 3 (ii) of Act 1938 as if the criterion for exclusion was the actual period for which the tax was payable and not the time within which the assessment was made. The absence of a provision for entry of date of assessment in form B cannot control the meaning of the Act.

A husband and wife were co-mortgagors and the husband was assessed on properties having an annual rental of Rs. 300 and the wife on properties with rental value of Rs. 432. The mortgagee claimed that the husband was the real owner and excluded from benefits of Act IV of 1938 by reason of Proviso C to S. 3 (ii) of the Act.

Held, Proviso C to S. 3 (ii) of the Act clearly requires that in order to come within its scope an individual must have been actually assessed, and it is not sufficient that he is interested in property in respect of which somebody else has been assessed.

(1939) 2 M.L.J 495 followed.

P.V. Rajamannar and *K. Subba Rao* for Petitioner.

K. Bhimasankaran for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. 16*th September*, 1940.

K. V. Ramaswami Aiyar *v.* Ramayya Sastrigal.

C. R. P. No. 1213 of 1938.

Madras Agriculturists Relief Act (IV of 1938), *S.* 19—*Payment before* 1—10—1937 *towards a decree for principal, interest and costs and entering of part satisfaction—Re-appropriation—If permissible.*

On a promissory note dated 21—6—1933 for Rs. 3,000 a decree was passed for Rs. 3,400 principal and interest with Rs. 337 for costs. On 23—2—1937 the respondent purchased the judgment-debtor's property in execution for Rs. 3,406 for which amount part satisfaction was entered on 17—7—1937. On 30—8—1937 a fresh E. P. was filed claiming Rs. 673—13—0 as the balance due under the decree. In an application for scaling down;

Held, the payment of Rs. 3,406 cannot be regarded as a payment to the debt generally, kept in suspense and not appropriated. The payment being more than sufficient to cover all the interest on the debt, the debtor will not be benefited by any re-appropriation from principal to costs under the proviso to S. 19.

T. V. Ramiah for Petitioner

T. L. Venkatarama Iyer for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ. 16*th September*, 1940.

Vasudevan Nambudri *v.* Kayyumma.

C. R. P. No. 854 of 1939.

Madras Agriculturists Relief Act (IV of 1938), *S.* 15—*Assignee of a portion of the properties demised under a kanom—If liable to pay the rent due to* jenmi *and entitled to benefits under S.* 15 *of Madras Act IV of* 1938.

An assignee of a part of the property demised under a kanom is liable by privity of estate to pay a proportionate part of the rent reserved under the lease, so long as he remains assignee, 38 Mad. 86 followed and by virtue of S. 41 of Malabar Tenancy Act the *jenmi* is entitled to recover the entire rent under the lease from such assignee The assignee of part of the demised property is therefore entitled to claim the benefit of S. 15 of Act IV of 1938.

P. Govinda Menon for Petitioner.

D. A. Krishna Variar for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ.
16th September, 1940.

Rajoo *alias* Doraiswami Goundar *v.* Palaniappa Chettiar.
C. R. P. No. 66 of 1939.

Madras Agriculturists Relief Act (*IV of* 1938), *S.* 3 (ii), *Proviso A —Assessee to income-tax in year ending* 31—3—1937 *in respect of income for year ending* 31—3—1936—*Applicability of Proviso A to S.* 3 (ii).

It was contended that Proviso A to S. 3 (*ii*) of the Act did not apply to a case in which the assessment was made in the year 1936—37 but in respect of the income of the previous year.

Held, Proviso A only disqualifies persons who have been assessed to income-tax in either of the two financial years preceding 31—3—1938 and it does not lay down any restrictions regarding the period in respect of which that assessment might have been made.

C. A. Seshagiri Sastri for Petitioner.

T. P. Gopalakrishna Aiyar for Respondent

K. S.

Wadsworth and Patanjali Sastri, JJ.
18th September, 1940.

C. S. Ramier *v.* B. N. Srinivasiah.
C. R. P. No. 1574 of 1938.

Madras Agriculturists Relief Act (*IV of* 1938), *S.* 19—*Extent of puisne mortgagee's right to scale down when owner of equity of redemption a non-agriculturist.*

A puisne mortgagee impleaded in a suit on first mortgage is a judgment-debtor and the mortgage debt is payable by him. The mere fact of the sub-mortgage by an agriculturist to a non-agriculturist does not take the debt outside the purview of the Act. The agriculturist judgment-debtor is entitled to the full benefit of the Act. Form of decree, where one debtor agriculturist and another non-agriculturist indicated.

M. S. Venkatarama Aiyar for Petitioner.

C. S. Venkatachariar and *D. Ramaswami Ayyangar* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
18th September, 1940.

Punyam Rangaswami Reddi *v.* Gali Gopalakrishna Reddi.
C.R.P. No. 790 of 1939.

Madras Agriculturists Relief Act (*IV of 1938*), *S. 3* (*ii*), *Proviso D and S. 15—Owner of* kudivaram *right purchasing* zemin *rights and becoming "landlord"—Usufructuary mortgages of* zemin *in two moieties—One of the mortgagees getting himself recognised as the "landholder" by the Collector —Owner retaining ryoti lands as tenant of his mortgagees—If a "landholder" of the estate paying more than Rs. 500 as* peishkash.

The petitioner owned the *kudivaram* in certain lands in an estate under the Madras Estates Land Act, which was paying Rs. 1,200 as *peishkash*. He purchased the *zemin* rights and was recognised as landholder by the Collector. In 1934 he executed two usufructuary mortgages each covering one moiety of the *zemin* right in the estate. He retained his ryoti lands and became the tenant of his mortgagees in respect of those lands. In 1935 the respondent one of the mortgagees obtained from the Collector recognition as the "landholder". In an application for scaling down,

Held, notwithstanding the recognition of the respondent as the landholder the petitioner as owner of the estate must also be deemed to be a landholder within the definition in S. 3 (5) of the Madras Estates Land Act. He is therefore not an agriculturist under Act IV of 1938 and disentitled to the benefits conferred by S. 15 of the Act.

T. L. Venkatarama Aiyar for Petitioner.

S. A. Seshadri Aiyangar for Respondent.

K.S.

Burn, J. Gopala Menon *v.* Meenakshi Ammal and others.
3rd September, 1940. C.R.P. No. 461 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 23—Decree wiped out by sale in execution and satisfaction entered—Person who was judgment-debtor if entitled to apply under S. 23.

Where properties of the judgment-debtor have been sold away, the sale confirmed and satisfaction of the decree entered up there is no longer a 'judgment-debtor' because the decree itself has been wiped out before the commencement of Act IV of 1938 and after that no application under S. 23 is competent by a person who was a judgment-debtor.

K. Kuttikrishna Menon for Petitioner.

K. P. Krishna Menon, A. P. Kuttisankara Menon and *C. K. Viswanatha Aiyar* for Respondents.

K.S.

Horwill, J. Vanjeeswara Aiyar *v.* District Board, South Arcot and others.
6th September, 1940. C.R.P. No. 1492 of 1937.

*Contract—Term that party is not entitled to be paid for work done if it was not check-measured or did not give satisfaction—Effect—*Quantum meruit *if applicable where party is not entitled to payment by reason of the term in the contract.*

Where by the terms of the contract the person who does the work agrees that he is not entitled to any remuneration unless the work has been check-measured, then, clearly he cannot claim for any work that has not been check-measured. There is no room for an implied contract, where there is an express contract in existence and in such a case the principle of *quantum meruit* cannot be applied. But a local body could have and should have paid for any work from which it derived some benefit and the board acted dishonestly in making no payment at all.

P. Sridhara Rao for Petitioner.

S. Panchapakesa Sastri and *K. R. Krishnaswami* for Respondents.

K.S.

Burn, J. Namberumal Setti *v.* Ramanujam Setti.
11th September, 1940. C.R.P. No. 256 of 1938.

Civil Procedure Code (V of 1908), O. 21, r. 90—Persons declared to be entitled to rateable distribution—Right to apply under O. 21, r. 90 to have the sale set aside for material irregularity or fraud.

A person who has been declared entitled to rateable distribution out of the proceeds of the sale is interested in the question whether the sale was to be set aside or confirmed. O. 21, r. 90 prescribes that such a person may apply to have the sale set aside on the ground of material irregularity or fraud. Considerations applicable to setting aside of sales under O. 21, r. 89 are not applicable in their entirety to the setting aside of sales under O. 21, r. 90.

B. Jagannadha Das for Petitioner.

K. Kuppuswami and *B. V. Subramaniam* for Respondent.

K.S.

The Chief Justice and Horwill, J. Nadimuthu Pillai *v.* Official Liquidator of Indo-Carnatic Bank.
11th September, 1940. O. S. A. No. 15 of 1940.

Companies—Liquidation—Shareholder's unstamped application for transfer three months before liquidation—Transfer not registered—If such a shareholder a contributory.

The appellant's application for transfer of his shares was sent in some three months before liquidation but the application was not stamped and the transfer was never registered.

Held, the appellant was a shareholder when liquidation commenced and he is a contributory.

N R C

M. S. Venkatarama Aiyar and *T. V. Ramanatha Aiyar* for Appellant.

S. Srinivasaraghavan (Official Liquidator).

K.S.

Wadsworth and Patanjali Sastri, JJ. Polisetti Venkataratnam *v.*
17th September, 1940. Dhulipudi Suryanarayana Rao.
C.R.P. Nos. 933 to 935 of 1938.

Madras Agriculturists Relief Act (IV of 1938), S. 23—Sale under Madras Estates Land Act on 10th December, 1937—Sale proceeds lying in Court and no sale certificate issued—Application on 9th April, 1938, under Act IV of 1938, S. 23—Maintainability.

S. 23 is applicable to sales in execution of any decree whereby immovable property in which an agriculturist is entitled to the benefits of the Act has been sold and if the application is made within 90 days of the commencement of the Act the Court is obliged if satisfied that the applicant is entitled to the benefits of the Act, to set aside the sale after giving notice to the persons interested and hearing them. The absence in the section of a *non obstante* provision regarding what is contained in the Madras Estates Land Act, the absence of any necessity for confirmation of sale under S. 131 of the Estates Land Act, and the absence of provisions in S. 23 regarding setting aside sales under the summary provisions contained in Ss. 112 to 118 of the Estates Land Act are not an indication that S. 23 would have no application to sales for arrears of rent. "Any decree" in S. 23 will include decrees under the Estates Land Act.

The mere holding of a sale will not wipe off the arrears of rent. The arrears will remain outstanding until the proceeds of sale are paid to the landholder. Apart from the question whether the tenants were entitled to benefits under S. 15 they are clearly entitled to benefits under the Act in respect of the decree as regards interest on costs and under Ss. 8 and 9 "Rent" includes rent covered by a decree.

The Court had therefore no option but to set aside the sales.

D. Narasaraju for Petitioner.

V. Suryanarayana and *K. Rangachari* for *A. Satyanarayana* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ. Beeyathumma and others *v.* Ibrayi.
18th September, 1940. C.M.S.A. No. 83 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Assignment by janmi *of decree for arrears of rent—Purchase of holding by assignee decree-holder in sale in execution—Confirmation of sale and delivery of property—Debtor's right to apply under S. 23.*

A *jenmi* obtained a decree for arrears of rent and assigned the decree to a stranger who himself purchased the holding of the tenant in the sale in execution on 6th January, 1938, and obtained possession after due confirmation of the sale. The tenant's legal representatives applied under S. 23 to have the sale set aside.

Held, though the tenant may not be entitled to any benefit under S. 15, as against the assignee decree-holder, the decree being for rent with interest and costs the tenant might be entitled to relief under Ss. 8 and 9 of the Act, and so the application under S. 23 is maintainable, as the tenant is an agriculturist entitled to the benefits of the Act, and the sale must be set aside.

K. P. Ramakrishna Aiyar for Appellants.

P. Govinda Menon for Respondent.

K.S.

Wadsworth and Patanjali, Sastri, JJ. A.K.C.T. Subramanian Chettiar
18th September, 1940. *v.* M. Subbia Mudaliar & others.
C. M. A. Nos. 586 and 604 of 1938.

Madras Agriculturists Relief Act (IV of 1938), S. 8, Proviso C to sub-section (ii)—Agreement by judgment-debtor to sell the immovables

situate within the Union—Possession transferred to intending purchasers—Debtor if excluded from operation of S. 8 (ii), Proviso C.

The judgment-debtor agreed to sell his lands situate within Union limits and put the intending purchasers in possession on or about June, 1935. The assessment continued to be in his name. He pleaded that he had ceased to be the owner of lands within the Union by virtue of S. 53 (A) of the T.P. Act and that Proviso C to S. 8 (ii) did not apply to him.

Held, the judgment-debtor continued to be a non-agriculturist in spite of the transfer of possession under the agreement to sell.

D. A. S. Swami for *T. Nallasivan Pillai* for Appellant.

A. Swaminatha Aiyar, S. Tyagaraja Aiyar and *K. R. Rangaswami Aiyangar* for Respondents.

K. S.

Wadsworth and Patanjali Sastri, JJ. Palani Goundan *v.* Peria Goundan.
18th September, 1940. C.R.P. No. 1734 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Decree on mortgage—Purchaser of equity of redemption—If judgment-debtor—Liability of, if 'debt' under Act liable to be scaled down.

The purchaser of the equity of redemption in a sale in execution of a money decree against the mortgagors claimed to have the mortgage decree amended under S. 19 of Act IV of 1938.

Held, in the absence of any definition in the Act, there is no obvious reason why the term "judgment-debtor" should not be understood as including a person whose liability is a "debt", as defined by the Act, more especially as that definition includes a judgment debt. 30 Mad. 587, applied. Decision of *Horwill, J.,* (1940) 2 M.L.J. 317, overruled.

The liability of the purchaser of the equity of redemption, is a "debt" within the meaning of the Act. I.L.R. (1939) Mad. 218, relied on.

It is immaterial whether or not the debtor had the agriculturist character when the debt was originally incurred where it was incurred prior to 1st October, 1937.

V. N. Venkatavaradachariar for Petitioner.

R. Desikan for Respondent.

K.S.

The Chief Justice and Horwill, J. The Municipal Council, Palani *v.*
19th September, 1940. Sri Dhandayuthapani Devasthanam.
S. A. No. 931 of 1937.

Madras District Municipalities Act (V of 1920), Ss. 81 and 83 (i) (a)—Construction—Power-house of Devasthanam—When exempt from property-tax—Power-house used for supplying electricity to shops and hotels and yielding profits—Effect.

A power-house was erected by the Palani Devasthanam on the Hill. The power-house supplied energy not only to light up the Hill and its approaches but also to certain shops and a hotel in the Hill for consideration yielding a profit. It was contended that the Hill having been set apart for public worship and the Hill continuing to be used for public worship the power-house on the Hill was not taxable as it was exempted under S. 83 (i) (a).

Held, if electricity had been used only for lighting the temple and its approaches the Devasthanam will be entitled to exemption. As the power-house was, however, used for supplying electicity to shops and a hotel yeilding a profit it was subject to assessment to property-tax. The property set apart for public purpose may or may not be used for the purpose. But to claim exemption from taxation it should not be used for any other purpose.

K. S. Sankara Aiyar for *T. R. Venkatarama Sastri* for Appellant.

T. M. Krishnaswami Aiyar for Respondent.

K. S.

The Chief Justice and Horwill, J. Mayandi Chettiar *v.* Madura Municipality through the Commissioner.
19th September, 1940. S. A. No. 582 of 1937.

Madras District Municipalities Act (*V of* 1920), *S.* 216—*Building commenced and completed before application for permission granted by Municipality—Notice under S.* 338, *compelling demolition of building and compliance with notice—Legality of action under S.* 338—*Proper procedure was that under S.* 216 *and not under S.* 338.

The plaintiff applied to the respondent municipality for permission to put up a building but before permission was granted he commenced and completed the building. The Special Officer of the Municipality issued a notice directing the plaintiff to demolish the building within four days under S. 338 of the Act as no licence had been obtained. In pursuance of the order the building was demolished. In an action by the plaintiff for damages,

Held, that a special provision should prevail against a general provision and the special officer ought to have issued notice under S. 216 (which specially relates to construction of buildings) to show cause why the building should not be demolished and the action taken under S. 338 (which was a general provision relating to all cases) was illegal and high-handed and the plaintiff was entitled to damages.

T. L. Venkatarama Aiyar for Appellant.

C. S. Rama Rao Saheb for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ. Ramaswamy Udaiyar *v.* Sevu Rama Am. Ramanatham Chettiar.
19th September, 1940. C. M. A. No. 643, etc. of 1938.

Madras Agriculturists Relief Act (*IV of* 1938), *S.* 19—*Application for scaling down a decree against which appeal was pending—Dismissal of application for scaling down—Appeal against order not clubbed with main appeal against the decree which was allowed to proceed* ex parte *by the applicant—Appeal against order infructuous as appellate decree had been substituted for decree sought to be scaled down.*

Section 19 of Madras Act IV of 1938 has no application to decrees passed after the Act came into force, one reason being that any person who has a contention to urge which will affect such a decree must urge it in the pending proceedings, and if he does not so urge he must be taken to have waived it. There is no reason to apply a different principle to proceedings in appeal of which the affected party has notice. Accordingly where an application to scale down a decree (against which an appeal is pending) is dismissed, and an appeal against such order of dismissal is not clubbed with the main appeal which is allowed to be decreed *ex parte* by the debtor, then after the disposal of the main appeal substituting the appellate decree for the decree sought to be sealed down, the original decree cannot be sealed down and an appeal against dismissal of the application for sealing down under S. 19 becomes infructuous and must be dismissed.

G. N. Chary for Appellant.

K. S. Ramabhadra Aiyar and *P. Sridhara Rao* for Respondent.

K. S.

King, J. Venkatasubbayya *v.* Ramabhotlu and others.
3rd September, 1940. C.R.P. No. 101 of 1938.

Provincial Insolvency Act (V of 1920), Ss. 53 and 54—Alienation by insolvent outside scope of S. 54—If can be attached under S. 53.

Where an alienation is outside the scope of S. 54, it cannot be attacked under S. 53. The alienee is under no obligation to pay an insolvent's creditors rateably as if he were an Official Receiver. If he has paid consideration in full and S. 54 is not applicable his purchase must be deemed to be in good faith.

K. Umamaheswaram for Petitioner.

K. Kuppuswami for Respondents.

K. S.

King, J. Gajapathiraju *v.* Kondayya and others.
11th September, 1940. C.R.P. Nos. 272 and 282 of 1938.

Madras Estates Land Act (I of 1908), S. 3 (16)—Free gift of land in recognition of past services—If "service tenure".

There can be no "service tenure" within the meaning of S. 3 (16) of the Madras Estates Land Act when a free gift is made of land in recognition of past services.

K. Umamaheswaram for Petitioner.

K. V. Gopalaswami and *S. Suryaprakasam* for Respondents.

K. S.

King, J. A.V.P. Palaniappa Chettiar *v.*
18th September, 1940. Deivanai Achi and others.
A.A.A.O. No. 98 of 1939.

Limitation Act (IX of 1908), Art. 182—Territorial jurisdiction of Court in which decree was passed transferred to another Court—Application for execution to Court to which decree was transferred—If application to 'proper Court'.

A decree was passed by the Subordinate Judge of Sivaganga in 1921. In May, 1925, a notification was issued by the Local Government transferring the territorial jurisdiction over the Taluk within which the cause of action in the suit arose from Sivaganga to Devakottai. In June, 1925, the District Judge of Ramnad passed an order transferring all the pending execution petitions and applications relating to that Taluk to Devakottai and also requested the Subordinate Judge of Sivaganga to send to Devakottai the records of the execution proceedings which had been disposed of in suits whose decrees were still alive. An application for execution was made to the Devakottai Court in 1926.

Held, the application of 1926 was not made to the 'proper Court' to save limitation.

M. Murugappa Chettiar for Appellant.

A. Swaminatha Aiyar and *S. Thiagaraja Aiyar* for Respondents.

K. S.

Burn, J. Chinna Narayana Reddy *v.* Narayana Reddy.
19th September, 1940. C. R. P. No. 438 of 1938.

Limitation Act (IX of 1908), S. 14—Plaintiff's petition to adjudge the debtor insolvent—Time spent in—When can be excluded from period

of Limitation—Negotiable Instruments Act, S. 94—Notice of dishonour—Essentials for validity.

A pronote dated 7—4—1933 executed by 1st defendant in favour of the 2nd defendant was assigned to the plaintiff on 2—12—1935. The plaintiff and another were prosecuting between 25—1—1936 to 25—3—1937 an insolvency petition to adjudicate the first defendant insolvent. The insolvency petition was dismissed on the ground that the debts amounted to less than Rs. 500. In a suit filed on 21—6—1937 on the promissory note,

Held, (1) It was not a case where the Insolvency Court was unable to entertain the petition for defect of jurisdiction and therefore S. 14 of the Limitation Act was inapplicable and the period during which the insolvency proceedings were prosecuted could not be excluded from the period of limitation.

(2) The notice of dishonour given to the 2nd defendant was not a valid notice as it failed to intimate that the plaintiff would hold the second defendant liable for the debt and the suit must be dismissed against both the defendants.

Kasturi Seshagiri Rao, Ramanujam and *Venkataseshiah* for Petitioner.

A. Bhujanga Rao for Respondent.

K. S.

Lakshmana Rao, J.
20th September, 1940.

Sanku Venkatachalam and others, *In re.*
Crl. R. C. Nos. 183 to 185 of 1940.

Madras Salt Act (IV of 1889), S. 74 (d)—Owner, driver and cleaner of motor lorry in which contraband salt was transported—Conviction under S. 74 (d)—When proper.

Where the owner, driver and cleaner of a motor lorry in which contraband salt was transported are not shown to have known, or had reason to believe that the salt was contraband, they cannot be convicted under S. 74 (d) of the Madras Salt Act IV of 1889.

A. Bhujanga Rao for Petitioners.

C. D. Venkatraman for *The Crown Prosecutor* for the Crown.

K. S.

Lakshmana Rao, J.
20th September, 1940.

Ramachandran, *In re.*
Crl. R. C. No. 211 of 1940.

Madras Motor Vehicles Rules (1938), *r.* 4, *cl.* (iii)—*"Contract carriage"—Use without permit—Offence.*

The car of the petitioner was used for carrying passengers for reward under a contract for the use of the vehicle for an agreed sum, and possession of the car was not transferred within the meaning of the explanation to r. 4, cl. (iii) of the Madras Motor Vehicles Rules, 1938. The car would therefore be a "contract carriage" as defined in r. 3, cl. (iii) and the petitioner had no permit to use it, as a contract carriage,

Held, the petitioner was guilty.

M. Ranganatha Sastri and *M. V. Ganapathi* for Petitioner.

The Crown Prosecutor on behalf of the Crown.

K. S.

[F.B.]

The Chief Justice, King and Patanjali Sastri, JJ.
23rd September, 1940.

In the matter of a First Grade Pleader.
Referred Case No. 16 of 1940.

Legal Practitioners Act (XVII of 1879), Rules framed under—R. 16—Failure to maintain accounts required by—Professional misconduct.

Failure to keep accounts of all moneys received and disbursed by a pleader in connection with each suit in which he is engaged as a pleader, is professional misconduct. Even if a vakil has not much work he is bound to keep accounts for whatever work he may have.

K. Umamaheswaram for *The Advocate-General*.

Respondent not represented.

K. S.

Lakshmana Rao, J.
26th September, 1940.

Commissioner, Dindigul Municipality *v.* Rajamani Aiyar.
Crl.R.C. No. 192 of 1940.

Madras District Municipalities Act (V of 1920), Ss. 249 and 313—Prosecution under—Refusal of executive authority to renew a licence—If ground for acquitting an accused prosecuted for not having a licence.

Where the executive authority declined to renew a licence and a person is prosecuted under Ss. 249 and 313 of the District Municipalities Act for carrying on business without a licence, he cannot be acquitted on the ground that the order of refusal is not valid.

V. Seshadri for *K. Raja Aiyar* and *K. S. Rajagopalachari* for Petitioner.

V. T. Rangaswami Aiyangar, A. S. Srinivasa Aiyar and *S. Seshadri* for Respondent.

The Public Prosecutor for the Crown.

K. S.

Wadsworth, J.
30th September, 1940.

Kumaraswami Reddiar *v.* Rangaswami Naicker and others.
C.R.P. Nos. 1588 and 1589 of 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 19 and 23—Sale in execution of mortgage decree—Application by judgment-debtor—Qualification for benefits under—Necessity to give notice to puisne mortgagee.

Even in respect of sale of mortgaged properties after 1st October, 1937, it is not enough that the judgment-debtor is the owner of the mortgaged properties to entitle him to the benefit of Ss. 19 and 23 of the Act. It must be shown that at the date of his application the judgment-debtor was possessed of other lands to entitle him to be deemed an "agriculturist" within the meaning of the Act.

Under the proviso to S. 23 notice to the puisne mortgagee is necessary and if he is not impleaded and notice has gone only to the decree-holder auction-purchaser, the terms of the proviso are not complied with.

K. S. Ramabhadra Iyer and *N. G. Krishnamachariar* for Petitioner.

Parasurama Aiyar for *T. V. Ramiah* for Respondents.

K.S.

[F.B.]

The Chief Justice, King and Patanjali Sastri, JJ.
30th September, 1940.

M. Lakshmana Iyer and another *v.* Ayyachami Chettiar and another.
S.A. Nos. 353 to 355 of 1937.

Madras Estates Land Act (I of 1908), Ss. 112 and 146—Assignee of registered pattadar recognised as ryot by landlord—Default in payment of rent—Assignee if can be proceeded against as "defaulter".

A transferee of the holding was recognised as ryot by the landlord. The pattas continued in the name of the transferor. After the death of the transferor the transferee was proceeded against as a "defaulter" and his holding was purchased by the landlord.

Held, the term "defaulter" in S. 112 of the Act would include cases of transferee of the whole or part of a holding, whom the landlord was not obliged to recognise under S. 146, but whom he had recognised as a ryot and the sale of the holding was valid.

44 Mad. 584, referred. 27 Mad. 332, relied on.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar* for Appellants.

T. P. Gopalakrishna Aiyar and *L. K. Sarma* for Respondents.

K.S.

[F.B.]

The Chief Justice, King and Patanjali Sastri, JJ.
30th September, 1940.

Seetharamanjaneyulu (minor by guardian) *v.* Vishnubhotla Ramayya.
C.M.S.A. No. 181 of 1938.

Civil Procedure Code (V of 1908), O. 21, r. 90—Proviso enacted by Madras High Court—Whether ultra vires.

The proviso to O. 21, r. 90, Civil Procedure Code, enacted by the Madras High Court is not *ultra vires* the rule-making powers of the High Court.

1937 Rang.L.R. 268 (F.B.), distinguished.

B. V. Ramanarasu for Appellant.

A. Lakshmayya for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
19th September, 1940.

Tammi Reddi *v.* The Imperial Bank of India at Cocanada.
C.R.P. No. 1379 of 1938 and A.A.O. No. 19 of 1939.

Madras Agriculturists Relief Act (IV of 1938), *S.* 4 *(e)—Applicability—Debt due to Imperial Bank cannot be scaled down.*

S. 4 (*e*) of Madras Act IV of 1938 is a complete bar to any attempt to scale down a decree passed in favour of the Imperial Bank.

P. Somasundaram and *P. Suryanarayana* for Petitioner.

O. T. G. Nambiar instructed by *King and Partride* and *D. Narasaraju* for Respondent.

K. S.

Pandrang Row, J.
24th September, 1940.

S. Sankaranarayana Aiyar Appellant.
S.A. Nos. 435 to 478 of 1940.

Madras Estates Land Act (I of 1908), *S.* 26 (3)*—Ryots paying from time immemorial only* 30 *panams as rent—Landlord whether entitled to benefit of S.* 26 (3).

The evidence showed that from time immemorial the rate of rent lawfully payable by the ryot was 30 panams so long as he continued to be a resident of the village. The condition of residence cannot be said to be an illegal condition which vitiates the contract of the original grant. S. 26 (3) of the Madras Estates Land Act relates only to cases where there has been a grant of land at a rent lower than the lawful rate payable by the ryot before the date of the grant. As there was no grant at a lower rate at any time the landholder is not entitled to the benefit of S. 26 (3) of the Act.

R. Ramamurthi Aiyar for Appellant.

K.S.

Burn, J.
26th September, 1940.

Imperial Bank of Cocanada *v.* Municipal Council, Cocanada.
C.R.P. No. 465 of 1938.

Madras District Municipalities Act (V of 1920), *Sch. IV, r.* 18*—Applicability.*

R. 18, Sch. IV of the Madras District Municipalities Act applies in terms to all persons and companies transacting any business other than money-lending, whether they are or are not at the same time transacting money-lending business.

O. T. G. Nambiar instructed by *King and Partridge* for Petitioner.

K. Bhimasankaram for Respondent.

K. S.

Wadsworth, J.
2nd October, 1940.

Satyanarayana *v.* Peddi Naidu.
C.R.P. No. 1010 of 1940.

Madras Agriculturists Relief Act (IV of 1938), *S.* 19*—Application under to appellate Court—If original matter—Civil Procedure Code (V of* 1908), *O.* 7, *r.* 10*—Applicability.*

An application under S. 19 of Act IV of 1938 for scaling down a decree passed by an appellate Court was dismissed on the ground that the application ought to have been presented to the Court of first instance. In revision,

N.R.C.

Held, that the nature of an application under S. 19 of the Madras Agriculturists Relief Act was akin to an original petition and therefore O. 7, r. 10 which applies to a plaint in a suit, applies equally to such an application by force of S. 141, C.P.C. and the application ought to have been returned for presentation to the proper Court.

17 All. 106 (P.C.) and 59 M.L.J. 75, referred to.

B. V. Ramanarasu for *V. Govindarajachari* for Petitioner.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for 1st and 2nd Respondents.

K. S.

King, J. M. Narayanaswami Chetti and others v.
7th October, 1940. B. Narayanaswami Chetti and others.
C.M.A. No. 271 of 1939.

Trustee suing—Removal from office pending suit—Right to continue the suit—Worshippers joining ex-trustee and filing appeal—Maintainability—Ex-trustee dead—Appropriateness of the order for retrial of suit.

One of three trustees filed a suit for recovering monies on behalf of the trust (impleading the other trustees as defendants) against certain 3rd parties. Pending the suit the plaintiff was removed from his office and as the successor did not come on record the trial Court dismissed the suit. Against the decision an appeal was filed by the plaintiff and three other worshippers (who were not parties to the suit) and the appellate Court remanded the suit on the ground that the plaintiff who was competent to institute the suit, could continue it. An appeal was filed against the order of remand and pending it the plaintiff died,

Held, that the worshippers who came on record for the first time in the appeal could not maintain the appeal and as the only person who could continue the suit was the plaintiff who is dead and as it is not a case where the legal representatives of the plaintiff could continue the suit, the order of remand has become inappropriate and should be set aside.

S. Ramachandra Aiyar for Appellants.

K. Kuppuswami for Respondents.

K. S.

King, J.
11th September, 1940.

Ranganayakulu v. Raghavamma.
A.A.A.O. No. 141 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 4 (h)—Woman creditor exempted under—Plea that creditor was benamidar—If open to judgment-debtor in execution proceedings.

Where a mortgagee decree-holder is a woman exempted under S. 4 (*h*) of Act IV of 1938, a plea in execution proceedings, that the assignment of the mortgage to the decree-holder was a benami transaction and that the real beneficial owners of the mortgage were men and therefore S. 4 (*h*) does not apply, is not open to the judgment-debtor, though it may be permissible in litigation between the alleged benamidar herself and the beneficial owners.

K. Kameswara Rao and *B. S. Ramachandra Rao* for Appellant.

V. Govindarajachari and *S. Ramachandran* for Respondent.

K.S.

Burn, J.
18th September, 1940.

Natesa Ayyar v. Singaravelu Pillai.
C.R.P. No. 24 of 1940.

Madras Debt Conciliation Act (XI of 1936), S. 25—Stay of execution in respect of same debt—If can be granted more than once—Application for conciliation—If can be made more than once.

Debtors cannot make more than one effective application for the conciliation of a particular debt under the provisions of the Madras Debt Conciliation Act. The existence of the provision in S. 7 by which an applicant can make a fresh application (if his application has been rejected on formal grounds) and the absence of any similar provision in S. 9 (when an application for conciliation has been dismissed on the merits) is conclusive on the point. Stay could not be ordered more than once under S. 25 in respect of the same debt.

(1939) 2 M.L.J. 727, followed.

Case-law discussed.

R. Somasundaram for Petitioner.

K. S. Desikan for Respondent.

K.S.

Pandrang Row, J.
26th September, 1940.

Krishna Menon v. Calicut Bank.
C.R.P. No. 621 of 1939.

Practice—Decree against tarwad *binding even on members not* eo nomine *parties—Declaration that decree was not binding—If can be obtained without cancelling the decree.*

Where a decree is binding on a member of a *tarwad* even though he is not *eo nomine* a party to that decree, unless that decree is set aside he cannot get any declaration that the decree is not binding on him.

20 Mad. 129 and I.L.R. 1940 Mad. 259, referred to.

N. Gopala Menon for Petitioner.

O. T. G. Nambiar instructed by *King and Partridge* for Respondent.

K.S.

Pandrang Row, J.
26th September, 1940.

Ramaswami Goundar v. Sellappa Goundar.
C.R.P. No. 1602 of 1939.

Practice—Plaint deliberately framed to avoid payment of higher court-fee—Amendment—Permissibility.

Where the plaintiffs deliberately intended to avoid payment of a higher court-fee, and for that purpose instituted the suit in the District Munsif's Court, and where no new facts have been discovered or any amendment necessitated by any technical plea raised by the defendants, the plaintiffs should not be allowed a *locus penitentiae* to amend the plaint.

NRC

T. V. Ramanatha Aiyar for Petitioner.
N. Somasundaram for Respondent.
K.S.

Pandrang Row, J.
26th September, 1940.

Suryanarayana Joshi *v.* Subbi Reddi.
C.R.P. No. 2160 of 1939.

Practice—Amendment of plaint—Procedure.

Where a plaintiff applies for amendment of the plaint, he cannot throw the burden on the court of deciding which part of his amended pleadings should be permitted and which part should be rejected. It is for the party to decide what amendments he wishes to make. The Court can only say 'yes' or 'no' to the request for permission to amend and cannot be asked to pick and choose between the various proposed amendments.

K. Kuppuswami for Petitioner.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondent.

K.S.

Pandrang Row, J.
27th September, 1940.

Duraiswamy Mudaliar *v.* Balasubbaraya Chetty.
C. R. P. No. 2307 of 1939.

Presidency Small Cause Courts Act (XV of 1882), S. 38—Decree, without contest—Scaling down and amendment of decree under S. 19 of Madras Act IV of 1938*—Application for retrial—Maintainability.*

A suit was not contested as the claim was admitted by one defendant and the other defendants remained *ex parte.* But subsequently the decree was scaled down and amended under Madras Act IV of 1938 after contest. An application by the debtor to the Full Bench for a new trial under S. 38 of the Presidency Small Cause Courts Act was rejected *in limine* on the sole ground that the application did not lie as the suit in which it was preferred was not contested. In revision,

Held, the application under S. 19 of Act IV of 1938 having been contested and the decree re-opened the suit must be deemed to have been contested and an application for retrial is maintainable.

C. Sarangarajan for Petitioner.
C. V. Athmanathan for Respondent.
K.S.

King, J.
10*th October,* 1940.

A.L.S.P.P.L. Subramanian Chettiar by agent Narayanan Chettiar *v.* Muthusami Goundan and others.
C. M. S.A. No. 106 of 1939.

Limitation Act (IX of 1908*), Art.* 182*, cl.* (5)*—"In accordance with law"—What is?*

A suit on a promissory note was originally decreed *ex parte* on 1st October, 1929, against three defendants. Subsequently on the application of the first defendant the *ex parte* decree was set aside against him alone on his depositing a certain amount. Later on a revised decree was passed on 27—6—1930 against all the defendants for a certain amount, after giving credit to the deposit in Court made by the first defendant and drawn out by the plaintiff. Thereafter the decree-holder proceeded to execute the decree against the first defendant claiming by mistake the larger amount awarded under the decree of 1—10—1929 and also filing a certified copy of the said decree. When the decree-holder discovered the mistake, he hastened to rectify the same and have the sale of the first defendant's properties which had meanwhile taken place set aside.

Subsequently on 19—7—1937 the decree-holder filed an execution petition against defendants 2 and 3 who pleaded the bar of limitation on the ground that the previous petitions against the first defendant would not save limitation.

Held, reversing the decisions of the Courts below that the liability of the defendants was there all the time, that the decree-holder was all along seeking to enforce the liability of the defendants and that the claim for excessive amount and the non-mention of the later decree of 27—6—1930 would not make the petitions be otherwise than in accordance with law within the meaning of Art. 182, cl. (5) of the Limitation Act.

The principle of the decisions in 38 L.W. 377, A.I.R. 1936 Pat. 26, (1940) M.W.N. 547 and 59 Bom. 1, followed.

K. V. Ramachandra Aiyar for Appellant.

V. Ramaswami Aiyar for Respondents.

K.S.

Wadsworth, J.
11th October, 1940.

V. L. Mannadiar *v.* P. S. Ranga Aiyar.
C.R.P. No. 2122 of 1939.

Debt Conciliation Act (XI of 1936), Ss. 4 and 25—Single creditor applying for settlement of debt—Judgment-debtor applying for stay of execution by other creditors—Maintainability.

When a single creditor has filed an application before the Debt Conciliation Board for the settlement of his debt, the debtor has no right to apply for stay of proceedings under S.25 of the Debt Conciliation Act in respect of any debt of any other creditor pending in the Civil Court though the application of the creditor before the Debt Conciliation Board may involve an enquiry into and settlement of the debts of all creditors.

K. S. Sankara Aiyar and *T. B. Balagopal* for Petitioner.

P. S. Narayanaswami Aiyar for Respondent.

S.V.V.

Wadsworth and Patanjali Sastri, JJ.
15th October, 1940.

Gurunatha Pillai *v.* Palaniandi Pillai and others.
C.M.A. No. 55 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 19 Proviso—Construction.

It was contended that the Proviso to S. 19 of Act IV of 1938 would not apply to amounts recovered in execution of a compromise decree (which did not originally provide for costs) but subsequently credited to the decree which as amended provided for costs.

Held, that the contention could not be accepted and that the funds resulting from the execution sale should be deemed to have been held in suspense till the amendment of the decree and then paid in part satisfaction thereof. They must therefore be regarded as amounts recovered..............in respect of "any such decree" within the terms of the Proviso to S. 19.

M. S. Venkatarama Ayyar for Petitioner.

K. Bhashyam Ayyangar and *R. Desikan* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
15th October, 1940.

Kodali Venkayamma *v.* Mamidipaka Ramakotayya.
C.R.P. No. 1078 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 8, cl. (2)—Applicability—Appropriation of open payments made prior to 1—10—1937—Awarding of counter interest on payments made—Effect.

When on open payments made in 1932 counter interest was awarded and a fresh promissory note was executed in 1934, after deducting the payment with counter interest,

Held, (1) that the mere fact that counter interest was awarded on open payments does not indicate that the payment should be treated as payments towards principal;

(2) that when a fresh promissory note was executed after deducting the payments with counter interest, it must be deemed that the appropriation was made at the time of the fresh promissory note;

(3) that the interest outstanding at the time of the fresh promissory note must be deemed to have been satisfied by the payment, and the balance if any appropriated towards principal;

(4) and that the onus lies heavily on the debtor to prove that the interest was outstanding on 1—10—1937 to get the benefit of S. 8 of Madras Act IV of 1938.

Y. G. Krishnamurthi for Petitioner.

K. Krishnamurthi for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ.
15th October, 1940.

Tadikimalla Subbarayudu *v.* Dumpa Venkateswarlu.
C.R.P. No. 1218 of 1940.

Madras Agriculturists Relief Act (IV of 1938), S. 8 (1)—Applications—Counter interest allowed on prior open payments—If sufficient to prove appropriation towards principal.

The mere fact of the allowing of counter interest on prior open payments at the time of a renewal is not sufficient to establish an appropriation of those payments to principal. Decision in C.R.P. No. 1076 of 1939 followed.

J. Krishnamurthi for Petitioner.

K. Krishnamurthi for Respondent.

K.S.

[F.B.]

The Chief Justice, King and Patanjali Sastri, JJ.
16th October, 1940.

Ramachandran (minor by next friend) *v.* Santaram (minor by guardian) and another.
C.R.P. No. 579 of 1937.

Limitation Act (IX of 1908), S. 20—Mortgagee directed to discharge mortgagor's debt due on a promissory note—If "agent duly authorised" to make part payment of principal or interest to save limitation under S. 20.

The maker of a promissory note directed his mortgagee to discharge from out of the mortgage consideration the debt due to the plaintiff under the promissory note. The mortgagee made two payments on 29—5—1933 and 16—7—1934 towards interest and duly endorsed the payments on the promissory note, but failed to pay the balance. In a suit on the promissory note filed within three years from the last of such endorsements,

Held (Patanjali Sastri, J., dissenting), that an authority to discharge a debt does not include an authority to make part payments and keep alive the debt and the suit is barred by limitation.

26 M.L.J. 509 and 51 L.W. 453, approved.

57 I.A. 1, distinguished.

K. Sanjeeva Kamath for Petitioner.

K. Vittal Rao for the 1st Respondent.

K.S.

Pandrang Row, J. Mangamma v. Paidayya.
24th September, 1940. S.A. No. 1010 of 1937.

Civil Procedure Code (V of 1908), S. 100—Second appeal—Practice—Judgment of lower appellate Court not dealing with reasoning of lower Court as to credibility of witnesses—If ground for second appeal.

Where the lower appellate Court dealt with the entire evidence in a few sentences and made no reference to the documentary evidence on the side of the plaintiff and gave no reason for rejecting the conclusion of the trial Judge as regards the credibility of the witnesses examined on the side of the plaintiff, such a judgment does not satisfy the requirements of law and must be deemed to be a judgment vitiated by an error in procedure. As a matter of law the lower appellate Court was bound not to go against the opinion of the trial Judge who had an opportunity of having the witnesses before him in deciding upon the credibility of the oral evidence in the case. Interference with conclusions of the trial Judge in matters of this kind must be deemed erroneous in law. A second appeal is competent in the circumstances.

Kasturi Seshagiri Rao for Appellant.

Y. Suryanarayana for Respondent.

K.S.

Pandrang Row, J. Ramanathan Chettiar by guardian v.
27th September, 1940. Somasundaram Chettiar.
C.R.P. No. 2378 of 1939.

Civil Procedure Code (V of 1908), O. 32, r. 15—Application after final decree for appointment of guardian ad litem *of mentally infirm defendant—Application necessitated by need to apply under S. 19 of Madras Act IV of 1938—Necessity to hold judicial inquiry and allow evidence to be adduced.*

The petitioner, the mother of the judgment-debtor who was mentally infirm, applied under O. 32, r. 15, C. P. Code, for the appointment of a guardian *ad litem* to apply for scaling down the decree debt. The petitioner was desirous of adducing evidence especially in the shape of a doctor's certificate, but no opportunity was given for this purpose as the lower Court was of opinion that the production of the medical certificate would not advance the case any further. In revision,

Held, that as the effect of the dismissal of the application would be to prevent the application of the provisions of Madras Act IV of 1938 to a case to which they may apply, it was incumbent on the Court to hold a judicial inquiry and allow the parties to adduce evidence.

V. Ramaswami Ayyar for Petitioner.

A. V. Viswanatha Sastri for Respondent.

K.S.

Wadsworth, J. Visalakshi Ammal v. Anikkadan Pokker.
30th September, 1940. C.R.P. Nos. 1470 and 1471 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 4 (h)—Decree assigned to a woman before 1—10—1937—Applicability of S. 4 (h) of Act IV of 1938.

The fact that a woman acquired a debt by an assignment before the Act came into force is irrelevant and she is exempt from the operation of the scaling down provisions of the Act.

K. P. Ramakrishna Ayyar for Petitioners.

K.S.

N R C

Mockett, J. Kadirvelu Chettiar *v.* Kempu Chettiar and others.
3rd October, 1940. C.R.P. No. 820 of 1939.

Civil Procedure Code (V of 1908), S. 144—Decree-holder assigning decree to third party during pendency of revision petition against decree—Third party realising decree amount—Re-trial ordered in revision—Decree for smaller amount in re-trial—Restitution.

S. 144 of the Code of Civil Procedure is worded in the most comprehensive terms and it should be widely construed. Its object is to put right what was originally an error of the Court and to restore the parties to the position they would have occupied. The word 'party' should be given a wide meaning, so as to include persons who would become subsequently concerned.

Thus where a decree-holder when a revision petition was pending assigns the decree to a third party who realises the amount and in a re-trial a smaller amount is decreed a claim to restitution as against the original decree-holder arises.

The fact that a party to a suit (a plaintiff) who has obtained a decree wrongly against another person prefers to get the immediate benefit of it by a sale or transfer, rather than waiting to execute against the party, in no way affects the right of the original party defendant to recover in restitution what he has paid over under pressure of the original erroneous decree. The fact that he paid it over to a nominee of the original plaintiff is wholly irrelevant to his right to recover against the person who caused him to make that payment, namely the original plaintiff.

V. T. Rangaswami Ayyangar and *K. Ramaswami Ayyangar* for Petitioner.

M. S. Venkatarama Ayyar for Respondent.

K.S.

Wadsworth, J. Thangaprakasathammal *v.* Ramalingam Pillai.
3rd October, 1940. C.R.P. No. 1455 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 14—Husband and wife joint promisors—Applicability of S. 14 to wife's debt.

Where the husband and wife are joint promisors, so long as her husband is alive since she has no share in the joint family property it would be apparently impracticable to apply S. 14 to her indebtedness.

K. Venkataramani for Petitioner.

M. Lakshmanan Nayak, M. R. Venkataraman and *T. K. Rajagopalan* for Respondent.

K.S.

Abdur Rahman, J. Tirupathi Rao *v.* Prahladrai Banwari Lal.
11th October, 1940. C.R.P. Nos. 596 and 597 of 1938.

Contract Act (IX of 1872), S. 16—Wagering contract in Bombay—Money paid under—Recovery—Prohibited under Bombay Act III of 1865—Suit if maintainable in Madras.

Where no suit is competent in Bombay to recover the amount paid to a defendant under Bombay Act III of 1865 in respect of a wagering contract, the suit cannot be instituted in Madras. The words of S. 1 of the Act are that no suit shall be allowed and not that no suit shall be instituted. The Courts in Bombay having jurisdiction to try the suit, the suit cannot be instituted in Madras.

V. Viyyanna for Petitioner.

K.S.

Wadsworth and Patanjali Sastri, JJ. Narayanan Chettiar *v.* Ottu Veera Goundan.
15th October, 1940.

A.A.O. No. 72 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 19—Promissory note, dated 4—1—1931 and letter of guarantee in respect of the note by others dated 7—8—1933—Compromise decree—Scaling down—Principles.

Defendants 1 and 2 executed a promissory note on 4—1—1931 and defendants 3 to 5 gave a letter of guarantee, dated 7—8—1933, in respect of the debt. There was a compromise decree for Rs. 5,000 for the debt including interest and costs against all the defendants. Subsequently defendants 1 and 5 applied by separate applications for scaling down the decree debt.

Held, (1) that the 5th defendant was entitled to have his liability under the letter of guarantee scaled down with reference to S. 9 and not with reference to S. 8 of the Act;

(2) that a decree on a compromise is substantially the same as a decree on any other contract and to the extent to which the compromise is a renewal of a pre-existing debt the decree has to be scaled down with reference to the principal originally advanced. (1940) 2 M.L.J. 296, followed;

(3) that it is not proper for the Court to reopen the compromise, tax the costs and appropriate the payment first towards the costs under the proviso to S. 19. (1940) 2 M.L.J. 476, followed;

(4) that the proviso to S. 19 applied only to the costs as originally decreed and not to costs in execution. (1940) 2 M.L.J. 685, followed.

T. P. Gopalakrishnan for Petitioner.

C. A. Seshagiri Sastri for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Sabapathi Mudaliar *v.* Rajarathinam Mudaliar.
16th October, 1940.

A.A.O. No. 661 of 1938.

Madras Agriculturists Relief Act (IV of 1938), S. 8, Explanation—Scope—Son estopped from questioning liability under a mortgage after partition by his father which he had attested—Subsequent mortgage by the son of his own property in discharge of father's mortgage debt—If renewal of earlier debt.

Although it had been held that a son was estopped from disputing the liability of his property under a mortgage by his father after partition by reason of his attestation of the mortgage, it cannot be said that a fresh mortgage executed by the son alone binding only his own property and discharging his father's mortgage is merely a renewal of the son's own liability. There is a complete *novatio* which cannot be treated as a renewal by the same debtor.

A. V. Viswanatha Sastri for Appellant.

S. Muthiah Mudaliar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. P. Satyanarayanamurthi *v.* Setti Ganisetti and others.
17th October, 1940.

C.M.A. No. 118 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 19—Final decree of 19—8—1937 on mortgage—Private sale of some items of hypotheca on 9—10—1937—Vendee directed to pay decree-holder—Balance remaining unpaid by vendee, a non-agriculturist—Debt scaled down to zero by operation of damdupat *rule—Vendee if can be impleaded and made liable for the debt as a non-agriculturist.*

After final decree on a mortgage some items of the hypotheca were sold on 9—10—1937 and the vendee was directed to pay the mortgagee decree-holder. A portion of the consideration remained unpaid when the debtor applied for entering up satisfaction of the decree, (more than twice the amount of the principal and costs having been paid towards the decree). The creditor sought to implead the vendee, a non-agriculturist, and make him liable for the balance due under the decree applying the principle laid down in C.R.P. No. 1584 of 1938.

Held, that the vendee cannot be impleaded as he has no separate rights to agitate in the execution of the decree, that he was not party to the decree and scaling down cannot be restricted to the judgment-debtor agriculturist's interest in the property in his possession inasmuch as that will result in splitting up of the decree against the only party to the decree, and that the principle in C.R.P. No. 1574 of 1938 will not apply in that the vendee was not a party to the suit.

P. Satyanarayana Rao and *M. Balakrishnamurthi* for Appellant.

V. Viyyanna for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
17th October, 1940.

Nataraja Goundan *v.* Catholic Syrian Bank, Ltd., Trichur.
C. M. A. No. 182 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 19—Decree for future instalments under a chit; fixing the principal—Reduction of the principal in scaling down—If permissible.

Under S. 19 of Act IV of 1938 the Court has no jurisdiction to reduce the principal of a decree debt except on the grounds laid down in the Act. A decree debt cannot be reduced merely on the basis that the decree did not give effect to a contention which might have been but was not raised. Accordingly where a decree fixed as the principal the total amount of the future instalments under a chit, the principal so fixed cannot be reduced in proceedings for scaling down.

K. V. Ramaseshan for Appellant.

R. Viswanathan and *N. D. Varadachariar* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
21st October, 1940.

Nadaraja Pillai *v.* Rangaswami Karamundar.
C. M. A. Nos. 325 and 428 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 19—Sale in execution of decree with permission to decree-holder to bid and set off—Sale prior to 1—10—1937—Application for scaling down decree amount—Maintainability, pending application to set aside sale under O. 21, r. 90, C.P.C.

In execution of a decree on two promissory notes the judgment-debtor's properties were sold in execution prior to 1—10—1937 and purchased by the decree-holder who had obtained leave to bid and set off the purchase-money towards his decree amount. An application to set aside the sale under Civil Procedure Code, O. 21, r. 90 was pending when the defendants applied under S. 19 of Act IV of 1938 for scaling down the debt.

Held, that such an application is maintainable and the decree is not satisfied before the confirmation of the sale by the mere purchase and set off by the decree-holder under O. 21, r. 72, C.P.C.

Case-law reviewed.

The Advocate-General (Sir A. Krishnaswami Aiyar), *C. A. Seshagiri Sastri* and *K. S. Devikan* for Petitioner.

K. Rajah Aiyar and *K. S. Rajagopalachari* for Respondents.

K.S.

Pandrang Row, J. Velayudha Maistry *v.* Mariammal.
23rd September, 1940. **S. A. No. 514 of 1939.**

Licence—Trees planted by licensees—Right to remove on termination of licence.

Trees planted under a licence do not go with the land and the person who planted the trees is entitled to cut and remove them; but he is to restore the land in the condition in which it was before the trees were planted.

The principle applicable to removal of buildings on another man's land would also apply to trees. 24 Mad. 47 (F.B.), referred to.

K. S. Desikan for Appellant.

V. Ramaswami Aiyar for Respondent.

K.S.

King, J. Sambasiva Ayyar *v.* Dharmi Ammal.
24th September, 1940. **A.A.A.O. Nos. 127 & 136 of 1939.**

Provincial Insolvency Act (V of 1920), S. 51 (1)—Date of admission of petition—Benefit of the execution—Meaning.

The date when the Court accepts an insolvency petition as having been validly presented is the date of the admission of the petition. Where properties were sold separately and their sale proceeds were realised separately, the sale of each lot was completed when the whole of the balance of the purchase money in regard to each lot was deposited in Court. Where money is realised for one of the lots after the admission of the insolvency petition the official receiver is entitled to it. 'Benefit of the execution' means the sum realised less the costs of execution.

57 Mad. 830=63 M.L.J. 402 and (1939) 1 M.L.J. 205, not followed.

Decision of Wadsworth, J., in C.M.A. No. 175 of 1937 [(1939) 2 M.L.J. (N.R.C.) 27], followed.

B. Sundaralingam and *A. V. Viswanatha Sastri* for Appellants.

T. K. Subramania Pillai for Respondents.

K.S.

Wadsworth, J. Parameswara Menon *v.* Kotana Narayana Menon.
3rd October, 1940. **C.R.P. No. 1401 of 1939.**

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Decree of foreign court—Execution in Madras Presidency—Application under S. 23 for stay—If can be granted.

Where the holder of a decree of a Court of the Cochin State executed his decree by the sale of properties in British India, the judgment-debtor cannot claim to be an agriculturist entitled to the benefit of Act IV of 1938. The Court which has to scale down the decree under S. 19 will be the foreign Court, to which however the Act has no application.

K. Kuttikrishna Menon for Petitioner.

Respondent not represented.

K.S.

Wadsworth, J. Ramalingam and another *v.* Thummalapalli Peda Kottayya and another.
7th October, 1940. **C.R.P. Nos. 1039 and 1040 of 1939.**

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Applicability.

In S. 23 of Madras Act IV of 1938 the words "property in which an agriculturist had an interest has been sold" must refer to the state of affairs at the time of the sale and cannot cover a case in which the agriculturist had parted with his interest in the property sold long before the sale. Where the property sold belonged to non-agriculturist defendants, S. 23 will have no application.

P. Somasundaram and *P. Suryanarayana* for Petitioners.

V. Viyanna for Respondent in C.R.P. No. 1039 of 1939.

K.S.

N R C

Wadsworth and Patanjali Sastri, JJ.
22nd October, 1940.

Chockalingam Chettiar *v.* Muthurama Chettiar.
C.M.A. No. 43 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 3, *Proviso C—Joint family—Assessment of manager—Effect.*

If the assessment in respect of joint family property was levied upon the manager of the family in his capacity as manager, then such assessment is sufficient to disqualify the family as a whole from the status of an agriculturist.

V. Ramaswamy Iyer for Appellant.

K. Rajah Ayyar and *N. G. Krishna Ayyangar* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
22nd October, 1940.

Parameswara Aiyar *v.* Narayanan Nambudiri.
C.R.P. No. 2563 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 15 (1)—*Assignment by non-agriculturist to agriculturist after coming into force of the Act—Rent due by such assignee—If falls under S.* 15 (1).

Where at the commencement of the Act the rent was payable by a non-agriculturist in respect of the suit land the mere fact that such land has been assigned after the Act came into force to an agriculturist cannot give the 'agriculturist' the benefit of S. 15.

K. P. Ramakrishna Aiyar for Petitioner.

D. H. Nambudripad for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
23rd October, 1940.

Balasubramania Goundan *v.* Muthukumara Pillai.
C.M.A. No. 47 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 19, *Proviso—Construction.*

Before applying the provisions of the Act to a decree, it is necessary first to satisfy the requirements of the proviso by adjusting from payments already made (whether made before or after 1—10—1937) towards the decree an amount necessary to satisfy the decree for costs. This right to adjust towards the cost of the decree is not subject to appropriations towards interest made before 1—10—1937.

R. Vaidyanathan for Appellant.

N. Somasundaram for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
24th October, 1940.

M. Munirathinam Iyer *v.* R. A. Rama seshagiri Iyer and others.
C.M.A. No. 553 of 1938.

Madras Agriculturists' Relief Act (*IV of* 1938), *Ss.* 8 *and* 19—*Entering up part satisfaction of decree—How far appropriation towards decree.*

A payment which has been definitely appropriated to the decree by the recording of part satisfaction cannot be regarded as unappropriated payment. The burden lies on the debtor to show that interest was outstanding on 1—10—1937 and unless he shows that a payment has not been appropriated towards interest the appropriations cannot be re-opened.

A. Seshachariar for Appellant.

N. Sivaswami, P. N. Sundararajan and *D. Noronha* for Respondent.

K.S.

Venkataramana Rao, J.
3rd October, 1940.

Chennakrishna Chettiar *v.* Secretary of State for India in Council by Collector of Salem.
S.A. No. 190 of 1938.

Agraharam land—Right to irrigation in respect of—If can be acquired by prescription against the Crown.

Where land which is the subject-matter of the suit is not ryotwari but agraharam land, in the face of S. 15 of the Easements Act, S. 2 of that Act cannot be invoked for defeating the claim of the plaintiff on the ground that no prescription can be pleaded against the Crown.

The decision in 71 M.L.J. 268 is applicable to the case of a ryotwari pattadar but not to the case of an inamdar.

A right to water acquired by prescription can be pleaded as an engagement within the meaning of the Irrigation Cess Act. 43 Mad. 529 (P.C.), followed.

An inamdar or zamindar can acquire a right against the Crown by prescription by enjoyment for over sixty years.

B. Sitarama Rao and *T. Krishna Rao* for Appellant.

K. Srinivasa Rao for Respondent.

K.S.

Wadsworth, J.
8th October, 1940.

Kothandarama Chettiar *v.* Adi Ammal.
C.R.P. No. 1060 of 1940.

Court-fees—Application for probate of a will—Allowance payable in pursuance of maintenance deed created during testator's lifetime—Maintenance payable to widow under the will—Value of—If to be deducted from gross value of assets for purpose of Court-fee.

In so far as a will leaves an annuity to a widow, that annuity is tantamount to a legacy and the value of it cannot be subtracted from the assets of the deceased which are subject to Court-fee on an application for probate. But where maintenance or allowance is claimed under a deed executed by the testator himself and given effect to during his lifetime and imposes a charge on certain properties the capitalised value of the allowance settled in the deed is a debt binding on the estate and must be deducted from the assets upon which Court-fee is payable. The value of the allowance will be governed by the expectation of life and it can be calculated by adopting some actuarial form.

Ch. Raghava Rao for Petitioner.

The Government Pleader (*B. Sitarama Rao*) and *K. Krishnaswami Aiyangar* for Respondent.

K.S.

King and Venkataramana Rao, JJ.
11th October, 1940.

Ukkali *v.* Sivaramakrishna Pattar.
S.A. No. 205 of 1936.

Malabar Tenancy Act (*XIV of* 1930), *S.* 17—*Renewal of kanom—If to be on same terms.*

The word 'same' in S. 17 connotes a renewal of the kanom on the same terms as the previous kanom. If the landlord declines to grant a renewal on payment of the proper renewal fee the tenant can seek the aid of the Court and the Court should grant a renewal of the kanom only on the same terms as the previous kanoms.

C. Unikanda Menon for Appellant.

R. Srinivasa Aiyar for Respondent.

K.S.

Mockett, J.
11th October, 1940.

Serukulam Swami, etc. *v.* Serukulam Pannai Annadhana Chatram.
C.R.P. Nos. 2658 & 2659 of 1939.

Court-Fees Act (*VII of* 1870), *S.* 7 (iv) (a) *and S.* 7 (v) (b)—*Trustee seeking to recover property in his own right—Provision applicable.*

N R C

Where a trustee seeks recovery of property in his own right S. 7 (*iv*) (*a*) of the Court-Fees Act does not apply, but S. 7 (*v*) (*b*) is the relevant provision.

R. Ramamoorthi Ayyar for Petitioners.

The Government Pleader for the Crown.

K.S.

Wadsworth and Patanjali Sastri, JJ. Pentela Venkayya *v.* Palepu Chinna Subbayya and others.
24th October, 1940. C.M.A. No. 591 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 9, 11 and 19—Allowing counter interest on payments—Inference—Decree for costs after 1—10—1932—Scaling down.

The mere allowing of counter interest on payments is nothing more than a method of calculation and cannot indicate an intention to adjust those payments to principal and not towards interest.

Decision in C.R.P. No. 1076 of 1938, applied.

A decree allowing interest on costs passed after 1—10—1932 must itself be scaled down as a debt falling under S. 9. It will carry interest at 5 per cent. per annum up to 22—3—1938 and thereafter at the decree rate which is less than the 6 1/4 per cent. specified in S. 12.

V. Suryanarayana for Appellant.

K. Kotayya for Respondents.

K.S.

Lakshmana Rao, J. Public Prosecutor *v.* Panchakarla Sooramma.
25th October, 1940. Crl. App. No. 457 of 1940.

Madras Prevention of Adulteration Act (III of 1918), Rr. 27 and 29—Adding water to milk—Offence—Purity of milk—If material.

Rule 27 of the rules framed under S. 20 of the Madras Prevention of Adulteration Act provides that no person shall add any water to milk intended for sale or offer for sale milk to which any such addition has been made. Rule 29 makes a breach of the rule punishable with a fine and where there is such a breach the purity of the milk is immaterial and an accused cannot be acquitted on the ground that the milk was not otherwise adulterated.

Public Prosecutor in person.

Respondent not represented.

K.S.

Lakshmana Rao, J. The Crown Prosecutor *v.* Ahmed Moideen.
25th October, 1940. Crl. Appeal No. 589 of 1939.

Madras City Police Act (III of 1888), Ss. 37 (2) and 45—Keeping or using a house for the purpose of gaming—Gist of the offence.

That bets were received by agents outside the house does not by itself negative the presumption of use of house for gaming purposes. S. 37 (2) of the City Police Act which makes it an offence to keep or use a house for the purpose of gaming on horse races, does not require the house to be kept or used for the purpose of betting with persons resorting thereto as under the English Act and *Bradford* v. *Dawson*, (1897) 1 Q.B.D. 307, is not in point.

Appellant in person.

K. P. Sarvothama Rao and *Muhammad Moheb Ali* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. S. Venkataswamier *v.* T. N. Ramaswamier and others.
28th October, 1940. C.M.A. No. 36 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Payments before 1—10—1937 towards debt—Burden of proof as to appropriations.

Where it is conceded that certain payments made by the debtor had been adjusted towards the debt prior to 1—10—1937, the adjustments must have been in reduction of either interest or principal. If the debtor is

not able to show that they are in reduction of principal leaving interest outstanding on 1—10—1937, he must fail, as the burden is on him to show that interest was outstanding on 1—10—1937 and was wiped out by S. 8 of the Act. On this matter there is no difference in principle between the cases of bankers charging compound interest and other creditors charging simple interest.

S. Ramaswami Aiyar for Appellant.

T. M. Ramaswami Aiyar for Respondents.

K.S.

Burn and Mockett, JJ.
29th October, 1940.

Subba Reddi v. Eswara Reddi and others.
C.M.A. No. 595 of 1938.

Provincial Insolvency Act (V of 1920), S. 35—Petition by another creditor for annulment of adjudication—Allegation that no debt was due to the petitioning creditor and that adjudication was result of collusion between insolvent and petitioning creditor—Delegation of inquiry to Official Receiver—Propriety.

A petition under S. 35 of the Provincial Insolvency Act for annulment of adjudication was filed by another creditor who alleged that, there was no debt owing to the petitioning creditor and the adjudication ought not to have been made as it was the result of collusion. The District Judge after admitting the documents filed forwarded the records to the Official Receiver to inquire into the matter and record the deposition of witnesses. Acting on that evidence the District Judge annulled the adjudication. On appeal, objection was taken for the first time to the procedure adopted in delegating the taking of evidence to the Official Receiver. The respondent contended that the objection ought to have been taken at the earliest opportunity and should not be allowed to be raised for the first time on appeal and that on the authority of 22 C.W.N. 700 it was open to the District Judge to "direct the Official Receiver to enquire and report for his own information".

Held, that the District Judge had no power to delegate to the Official Receiver the duty to inquire into the facts of the case and the fictitious character of the debt due to the petitioning creditor.

Kasturi Seshagiri Rao for Appellant.

S. S. Bharadwaj for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
31st October, 1940.

Venkataranga Reddi v. Parakuchinna Sithanna.
C.M.A. No. 51 of 1939.

Execution proceedings—Constructive res judicata *barring judgment-debtor—Sons of such judgment-debtor if also barred.*

An order for execution made after notice to the judgment-debtor who does not appear and offer any objection precludes him from raising a plea of limitation in subsequent proceedings even though the application on which the order was passed does not fructify and is eventually struck off or dismissed. 24 Mad. 669, followed. 58 All. 218 (F.B.), dissented from.

But the sons of the judgment-debtor when proceeded against in execution under the pious obligation theory will not be precluded from pleading the bar of limitation by *res judicata.* I.L.R. 13 Luck. 61 (P.C.), followed. (1940) 1 M.L.J. 363, distinguished.

K. Srinivasa Rao for Appellant.

P. Basi Reddi for Respondents.

K.S.

Patanjali Sastri, J. Audiseshayya v. Venkataswami and another.
1st November, 1940. C.R.P. No. 194 of 1938.

Madras Village Courts Act (I of 1899), Ss. 13 and 73—Suit for recovery of movables or their value Rs. 50—Jurisdiction of Village Court to try—Order of District Munsif under S. 73 revising the Village Court's order—If open to further revision by High Court under C. P. Code, S. 115.

A revision by the High Court is competent against orders of District Munsifs under S. 73 of the Village Courts Act. 53 M.L.J. 131, relied on and 34 I.C. 508, distinguished.

A suit for the recovery of movables is a suit for recovery of personal property within the meaning of S. 13 of the Village Courts Act and the Village Court has jurisdiction to entertain such a suit if the value is not over Rs. 50.

Kasturi Seshagiri Rao for Petitioner.

K. Venkateswaran for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ. Ramasubbier v. Ramier and others.
C.M.A. Nos. 101 and 160 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 8, Explanation—Scope.

On 14—8—1922 *P* and his sons *R* and *V* executed a promissory note for Rs. 7,000 in favour of *S* on whose death his two sons *X* and *Y* divided the debt between them and in pursuance thereof, the debtors *R* and *V* executed on 19—8—1925 two promissory notes one to *X* for Rs. 4,900 and another to *Y* for Rs. 2,600. On 13—8—1928 *R* and *V* and the other two sons of *P* who had not joined in the execution of the earlier pronotes executed two pronotes for Rs. 5,400 and Rs. 2,200 to *X* and *Y* respectively in renewal of the two promissory notes of 1925. In June, 1931, *V* separated himself from his brothers, and the other three brothers who continued joint, executed promissory notes for Rs. 5,968 and Rs. 2,425 respectively in settlement of the debts due under the notes of 1928. *X* and *Y* obtained decrees on 16—9—1933 and 6—2—1933 on their respective promissory notes. The lower Court sealed down the decrees with reference to the principal sum of the promissory note of 14—8—1922 apportioning the amount sealed down between the two decree-holders in the ratio of Rs. 4,900 to 2,600. On appeals by the decree-holders,

Held, (1) that the various notes were executed on behalf of the joint family of *P* and his sons, and the debtors were substantially the same being the joint family. (1940) 2 M.L.J. 651, followed;

(2) that the creditor in respect of each set of promissory notes executed subsequent to the partition in the creditor's family is the same, namely *X* and *Y* respectively. The debt due under each of these decrees can be traced back through successive renewals to the two pronotes of 19—8—1925;

(3) the earliest note of 14—8—1922 having been executed to *S* the father, and the debt having been split up at the subsequent partition between *X* and *Y* cannot be said to be renewed or included in a fresh document within the meaning of the Explanation to S. 8, although the sums for which the later pronotes were executed were equal in the aggregate to the original debt. The sealing down process will therefore have to stop with and not go beyond the two promissory notes in favour of *X* and *Y* respectively, of 19—8—1925.

T. M. Ramaswami Aiyar for Appellants.

B. C. Seshachala Aiyar for Respondents.

K.S.

The Chief Justice and Patanjali Sastri, J.
2nd October, 1940.

Raja of Vizianagaram *v.* Narayanaraju.
C.R.P. No. 725 of 1937.

Madras Estates Land Act (I of 1908), S. 25—Agreement by ryot to pay a premium—Ryot let into possession—Landlord, if can recover the premium afterwards.

Where a ryot has agreed to pay a premium and has been let into possession before making the payment, the landholder cannot recover the amount from him afterwards. The ryot may pay the premium if he chooses but he cannot be held liable to pay. There is no liability after entry.

K. Kuttikrishna Menon for Petitioner.

Respondent not represented.

K.S.

Pandrang Row and Abdur Rahman, JJ.
11th October, 1940.

Lakshminarasimhacharyulu *v.* McLawrin High School, Cocanada.
Appeal No. 209 of 1938.

Master and servant—Contract of service—Provision that appointment is "permanent" and will not "ordinarily" be terminated—Construction.

Where a contract of service provided that the appointment was permanent and will not ordinarily be terminated by the manager, and the employee's services were dispensed with on the ground of "financial stringency" in the employer institution, in a suit for damages for breach of contract,

Held, it would not be every financial stringency that would come under the definition of other than 'ordinary' but it must be of a sufficiently grave character as to necessitate the termination of the contract with the plaintiff and the burden is on the employer to prove that there was such an extraordinary financial stringency.

V. Govindarajachari and *D. Suryaprakasa Rao* for Appellant.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *D. Narasaraju* for Respondent.

K.S.

The Chief Justice and Krishnaswami Ayyangar, J.
16th October, 1940.

Jayalakshmi Ammal *v.* Mylapore Hindu Permanent Fund.
O.C.C.A. No. 20 of 1939.

Gift deed—Construction.

A donor after reciting that she had given the properties as stridhanam to her grand-daughter proceeded to state as follows: "She shall take possession of the said house on the said date, collect the rent thereof, discharge the debt (a debt owed by the donor) and enjoy the same; and the said property shall after her be enjoyed by the male issues or the female issues of the donee, from son to grandson and so on hereditarily with right to gift, exchange or sell the same."

Held, that the gift conferred an absolute estate and the words 'after her' are to be regarded as words of inheritance and not limitation.

T. C. A. Bhashyam and *T. C. A. Thirumalachari* for Appellant.

A. Venkatasubba Mudaliar for Respondent.

K.S.

The Chief Justice and Krishnaswami Ayyangar, J.
17th October, 1940.

Gaffar Khan *v.* Syed Noor.
O.C.C.A. No. 36 of 1939.

Limitation Act (IX of 1908), Art. 62—Action for recovery of money stolen—Limitation.

Where a person has lost money by theft he can sue the thief for the recovery of the money quite apart from the crime but if he does, the suit must be framed as one for money had and received, in which case it will

be governed by Art. 62 of the Limitation Act which expressly relates to suits for money had and received.

49 Mad. 468 (F.B.), distinguished.

Obiter: The English Law as to suspension of civil remedy until the felon has been convicted is not applicable to India as there is no distinction between a misdemeanour and a felony.

S. Duraiswami Aiyar and *S. D. Jayaraman* for Appellant.

Rafiuddin Ahmad for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
17th October, 1940.

V. Gundarayudu *v.* K. Seshayya and others.
C.M.A. No. 83 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 8, Explanation—"Assignee of creditor"—If "same creditor".

Where it was argued that for the purposes of the explanation to S. 8, the expression "same creditor" meant the identical person and cannot be interpreted in the light of the definition to include the assignee of the original lender;

Held, that the contention could not be accepted.

C.R.Ps. Nos. 618 and 140 of 1939, approved.

Ch. Raghava Rao for Appellant.

A. Lakshmayya for Respondents.

K.S.

The Chief Justice and Krishnaswami Ayyangar, J.
22nd October, 1940.

Kunyil Chandu *v.* Mathiledath Sankaran.
L.P.A. No. 35 of 1939.

Malabar Tenancy Act (XIV of 1930), S. 20—Scope and applicability.

A landlord in Malabar cannot maintain a suit for the eviction of a kanomdar except on one or more of the several grounds enumerated in S. 20 of the Malabar Tenancy Act. The language employed in S. 20 is plain and peremptory and its effect is to supersede and nullify all contracts which recognize a right of eviction in the landowner contrary to the terms of the section.

Decision of Patanjali Sastri, J., in (1939) 2 M.L.J. 21 (N.R.C.), affirmed.

P. Govinda Menon for Appellant.

Respondent not represented.

K.S.

The Chief Justice and Krishnaswami Ayyangar, J.
24th October, 1940.

Rajamanickam Chetty *v.* Abdul Halim Sahib.
L.P.A. No. 44 of 1939.

Transfer of Property Act (IV of 1882), S. 6 (e)—Suit for damages for wrongful dispossession of premises in breach of lease agreement—Assignment by sale of the "profit and loss of the suit"—Assignees if entitled to continue the suit.

Where after filing a suit for damages for wrongful dispossession of premises in breach of a lease agreement the plaintiff assigned by sale the profit and loss of the suit to *X* and died thereafter and *X* claimed to have the right to be brought on record and continue the suit,

Held, the right to recover damages whether for tort or contract is a mere right to sue and according to S. 6 (*e*) of the Transfer of Property Act cannot be transferred. The assignee of the fruits of a pending action obtains no right to interfere in proceedings in the action.

48 Mad. 230 (P.C.), followed.

N. Srinivasa Aiyangar for Appellant.

C. Padmanabha Aiyangar for Respondent.

K.S.

Abdur Rahman, J.
25th October, 1940.

Narparaju Ramamurthy *v.* Venkatanarayana.
S.A. No. 633 of 1940.

Madras Local Boards Act (*XIV of* 1920), *S.* 19 *and r.* 1—*Suit for injunction restraining holding of election—Election held since the filing of the suit—Denial that any election was held—Maintainability of suit in Civil Court.*

In a suit for injunction restraining the holding of an election, the election was alleged by the defendant to have been held subsequent to the suit but the plaintiff contended that the election was not held. It was claimed that the declaration by the Local Government was final in regard to the factum of election and cannot be questioned in a Civil Court.

Held, that there is no provision making a declaration by the Local Government under S. 19 to be final in regard to the *factum* of election and the Civil Court was entitled to entertain the claim and adjudicate on the question whether the election was held or not. If the finding in the suit was that no election was held in fact the suit for declaration can be decreed and an injunction granted.

K. Raja Ayyar and *N. Krishnamachari* for Appellant.

B. Jagannadha Das for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
4th November, 1940.

Yeddula Chinnabbi and three others *v.* Yeddula Venkatasubbamma and another.
C.M.A. No. 500 of 1938.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 4 (*h*)—*Maintenance allowance under a decree—Whether "property" within the meaning of section.*

The maintenance allowance decreed to a Hindu daughter is "property" within the meaning of S. 4 (*h*) and therefore she is entitled to the immunity afforded by that provision.

Case-law discussed.

Kasturi Seshagiri Rao for Appellants.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
5th November, 1940.

Ramanathan Chettiar *v.* Sitaram Iyer.
C.M.A. No. 134 of 1940.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 8 (ii), *Proviso* (*A*)—*Partnership—Assessment to income-tax—No assessment of partner individually—Effect.*

Where a partnership and not the individual partner was assessed to income-tax and the question was whether the individual can claim the benefit of the Act,

Held, that when the partnership is assessed the individual partner is also assessed within the meaning of the Act.

V. T. Rangaswami Iyengar and *K. S. Sankararaman* for Appellant.

A. K. Sreeraman for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
6th November, 1940.

Maturi Seshiah *v.* Lanka Chinna Punnayya.
C.M.A. Nos. 27 and 28 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 19—*Application by one debtor impleading other debtors as respondents, for setting aside sale in execution and for scaling down decree—Application for withdrawal—Rights of other debtors.*

One of the heirs of a deceased Mahomedan judgment-debtor applied for setting aside the sale in execution and for scaling down the decree

impleading the other heirs as respondents who did not support him. The applicant then applied for withdrawal of his application and the other heirs sought to be transposed as applicants. The application to be transposed was dismissed, but the other heirs were permitted to file a counter-affidavit in the original application and the sale was set aside.

On appeal, *held*, that the application for relief under Act IV of 1938 enured to the benefit of the other heirs also and the sale could be set aside.

Held also, that the Court had a discretion to allow the withdrawal of the application only subject to the rights of the other heirs (respondents).

57 Mad. 892: 66 M.L.J. 517, relied on.

P. Somasundaram and *P. Suryanarayana* for Appellant.

K. Umamaheswaram and *P. Satyanarayana Rao* for Respondent.

K.S.

Abdur Rahman, J.
6th November, 1940.

Ponnappa Pillai *v.* Bagirathi Ammal and others.
S.A. No. 337 of 1937.

Will—Bequest with restraint on alienation—Effect.

When a testator bequeathed all his properties in favour of his adopted son and the material clause in the Will was as follows: "..................I have bequeathed to my son, the schedule mentioned properties worth Rs. 28,116-12-1 to be got by him after my death. The said person shall improve the same without making any alienation and conduct the charities mentioned herein till the end of his lifetime and enjoy the same with hereditary rights" and the Will contained no provision as to who was to enjoy the properties after the death of the donee.

Held, that the Will conveyed only a limited estate and the adopted son had no right to settle the properties on anybody.

K. S. Sankara Aiyar and *A. K. Sreeraman* for Appellant.

K. R. Rangaswami Iyengar and *S. Venkatesan* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
11th November, 1940.

Nagasundaram Pillai *v.* Mathurbootham Aiyar.
C.M.A. No. 99 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 19 and 20—Application for stay and for scaling down by one judgment-debtor—If all other co-judgment-debtors should join in it.

There is nothing in S. 19 or S. 20 which compels all co-judgment-debtors who have claims as agriculturists to join in an application for stay or for scaling down filed by any other judgment-debtor.

A. V. Narayanaswamy Aiyar for Appellant.

K. V. Sesha Aiyangar for Respondent.

K.S.

The Chief Justice and Krishnaswami Ayyangar, J.
12th November, 1940.

Gourochandra Dyano Sumanto *v.* Krushnachandra Padhi minor by next friend.
L.P.A. No. 64 of 1939.

Negotiable Instruments Act (XXVI of 1881), S. 87—Promissory note—Alteration of dates of execution of document and indorsement of interest paid—Plaintiff not guilty of any complicity—If S. 87 applicable.

S. 87 would only apply to cases of fraudulent alteration by a party and to cases where due to negligence by the party it will be possible for a stranger to make the alteration.

(Decision of Abdur Rahman, J., reported in (1939) 2 M.L.J. 686, affirmed).

B. Jagannadha Das for Appellant.

B. V. Ramanarasu for Respondent.

K.S.

Wadsworth, J.
11*th October*, 1940.

Lakshmudu *v.* Saramma.
C.R.P. No. 1519 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Dismissal of application for default—Application for restoration—C. P. Code (V of 1908), O. 9, r. 9 and S. 141—Applicability.

An application under O. 9, r. 9 read with S. 141 of the Code of Civil Procedure would lie to restore an application under S. 23 of Madras Act IV of 1938, which has been dismissed for default.

A. Lakshmayya for Petitioner.

B. V. Ramanarasu for Respondent.

K.S.

King, J.
11*th October*, 1940.

Kovvuri Subba Rao *v.* Venkatapuram Panchayat Board.
C.R.P. No. 482 of 1938.

Local Authorities Loans Act (I of 1888), S. 4—Panchayat Board taking a loan without sanction of Local Government as required by the rules—Effect on contract—Right of creditor to recover the amount lent under S. 65, Contract Act.

A loan was contracted by a Panchayat Board without obtaining the sanction of the Local Government required under the rules framed under S. 4 of the Local Authorities Loans Act.

Held, that though the contract of loan was void and no suit to enforce it would lie, the creditor was entitled to the restoration of his money under S. 65 of the Contract Act.

Case-law discussed.

V. Viyanna for Petitioner.

P. Satyanarayana Rao for Respondent.

K.S.

Venkataramana Rao, J.
18*th October*, 1940.

Chinnaswami *v.* Mashavaraya Padayachi.
S. A. No. 855 of 1937.

Promissory note—Suit by indorsee under a forged indorsement—If maintainable.

Before an indorsee of a promissory note can get a decree on the strength of the indorsement, he must prove that the indorsement is genuine, if its genuineness were challenged; else he will have no title to sustain his action. Once a document is found to be a forgery brought about to defraud some person of his claim that is enough to vitiate it and no action can be founded thereon.

T. K. Sundararaman for Appellant.

T. S. Nataraja Pillai for Respondent.

K.S.

Abdur Rahman, J.
23*rd October*, 1940.

Azeezuddin Sahib *v.* St. Joseph's College.
S. A. No. 103 of 1938.

Madras Survey and Boundaries Act (VIII of 1923), S. 13—Decision of survey authorities registering land in favour of plaintiff, a mosque—If tantamount to putting the mosque in possession.

The decision of a Survey Officer would not affect the possession of the party against whom it was given. The order registering land in favour of the plaintiffs cannot have the effect of putting the plaintiffs in possession and if the plaintiffs fail to prove that they have been in possession at any time within 12 years of the suit, the suit must fail on the ground of limitation.

T. V. Muthukrishna Aiyar and *K. G. Srinivasa Aiyar* for Appellant.

K. V. Sesha Aiyangar for Respondent.

K.S.

N R C

Abdur Rahman, J.
25th October, 1940.

Veerabhadra Pillai *v.* Narayanaswami Iyer.
C.R.P. No. 182 of 1939.

Civil Procedure Code (V of 1908), O. 21, r. 90—Sale of melvaram *interest alone*—Kudivaramdar, *if could apply for setting aside.*

Where only the *melvaram* interest is sold in execution of a decree the *kudivaramdar* will not be a person whose interests have been in any way affected by the sale of the *melvaram* interest and as such he has no *locus standi* to present an application under O. 21, r. 90, C. P. Code.

R. Ramamurthy and *T. R. Sundaram* for Petitioner.

K. V. Srinivasa Aiyar and *T. K. Subramania Pillai* for Respondent.

K.S.

The Chief Justice and Krishnaswami Aiyangar, J.
28th October, 1940.

Raman Chettiar *v.* Muthupalaniappa Chettiar.
L.P.A. No. 47 of 1939.

Provincial Insolvency Act (V of 1920), S 77—Letter of request—Sufficiency to confer jurisdiction on Court acting in aid.

The District Court of Amherst in Burma adjudicated a person as insolvent and asked the District Court of Ramnad to act in its aid in deciding the question of title to certain immovable properties of the insolvent (situated in the Ramnad District) and left the matter to the decision of the Ramnad Court.

Held, that the Ramnad District Court had full jurisdiction by reason of S. 77 of the Provincial Insolvency Act, to deal with the matter. There is no necessity for any special letter of request from the Amherst Court. Directing a party to file a petition asking for adjudication on a question of title in the District Court of Ramnad is sufficient acknowledgment that the Amherst Court had asked the Ramnad Court to decide all matters relating to that particular property.

T. Nallasivan Pillai for Appellant.

K. Ramanathan Chettiar for Respondent.

K.S.

Pandrang Row and King, JJ.
29th October, 1940.

Saladi Padmavathi *v.* Official Receiver of West Godavari.
Appeal No. 331 of 1937.

Gift—Donor having considerable debts—Validity of gift as against creditors.

In spite of there being debts amounting to Rs. 40,000 valuable properties of considerable extent were all of them gifted by the debtor to his wife without any reference being made therein as to how his debts were to be paid off. The gift instead of a will looked like having been deliberately executed in order to prevent the creditors from having a claim on the properties of the executant.

Held, the gift deed in question was one in fraud of creditors and void as against the creditors.

P. Chandra Reddi for Appellant.

P. V. Rajamannar and K. Subba Rao for Respondent.

K.S.

Pandrang Row and Abdur Rahman, JJ.
1st November, 1940.

Raja Mahadeva Royal *v.* Raja Virabasava Chikka Royal.
Appeal No. 6 of 1936.

Hindu Law—Adoption by widow—Validity—Consent of sapindas—Absence of consent of nearest male sapindas—Consent of co-widow, mother-in-law and remoter male sapindas—If sufficient.

Impartible estate—Renunciation by father in favour of eldest son—Effect on nature of estate in the hands of the son—Settlement deed by

holder of impartible estate providing for maintenance of his brother—Recital that there was to be no relationship except by blood—Effect on right of survivorship.

Evidence Act (I of 1872), Ss. 32 and 73—Affidavits in another suit not ante litem motam—*Admissibility—Certified copies of letters filed in another suit—When admissible as public documents in evidence.*

A, the senior widow of the holder of an impartible estate, adopted *X* with the written consent of her mother-in-law, her co-widow, and three other remoter male sapindas. The consent of her husband's paternal uncles *B* and *C* was not obtained. As regards *B* she formally wrote a letter asking for his consent but did not wait to ascertain his views on the propriety of the proposed adoption, and made the adoption before receiving any reply from him. As regards *C* she did not ask for his consent at all. In a suit by *C* for the recovery of possession of the zemindary properties on the footing that he was the nearest surviving coparcener,

Held, (*i*) the consent of the co-widow and mother-in-law as female sapindas, in the absence of the consent of the nearest male sapindas was not sufficient to make the adoption valid. Observations in 12 M.I.A. 442 at p. 444, 39 Mad. 772 and 48 Mad. 1 at p. 204, explained. 41 Mad. 998 at 1004, applied.

(*ii*) The consent of the remoter sapindas will not validate the adoption in the absence of the consent of *B* and *C*, the nearer sapindas, without proof that their consent was improperly withheld.

(*iii*) When the consenting sapindas have been parties along with the widow in setting up a false case as to the existence of oral authority in favour of the widow by her husband, the consent cannot be held to be *bona fide* given in the spiritual interests of the deceased husband.

(*iv*) When the zemindar during his life time renounced his rights in favour of his eldest son and later on executed a will stating that he had already renounced his estate and disposing of his other separate property with provision for maintenance to his younger sons from the zemindary property in the hands of the holder, the property in the hands of the eldest son cannot be regarded as his separate property. It was merely an acceleration of succession by renunciation and there is no change in the joint family character of the estate. I.L.R. 1939 Mad. 443 : (1939) 1 M.L.J. 814, distinguished. Such a renunciation need not be in writing. S. 9 of the Transfer of Property Act applied and 24 Mad. 377, distinguished.

(*v*) Where a Zemindar and his brother entered into a settlement under which the latter was to receive maintenance from out of the income of the zemindary and the settlement recited that thenceforward 'except blood relationship there shall be no relationship as regards properties' the words are not enough to constitute an express renunciation of all the prospective rights of succession by survivorship to the zemindary which is necessary under Hindu law. 10 Mad. 334, 20 Mad. 265, applied. 1 Mad. 312, 5 C.L.R. 439, distinguished. 43 All. 228, 51 Mad. 189, 59 Cal. 1399, 56 All. 468, referred to.

(*vi*) Affidavits of third parties filed in proceedings in the revenue Courts in Hyderabad relating to the enquiry as to succession to zemindary property in Hyderabad stating that an adoption took place, tendered in evidence under S. 32 (5) of the Evidence Act will be inadmissible in evidence under that provision since they were not *ante litem motam* but are admissible under sub-S. (7) as relating to a transaction as is mentioned in S. 13 (*a*). Case-law discussed.

(*vii*) Copies of letters filed in proceedings in Hyderabad bearing certificates of the Resident that the document is the copy of a public docu-

ment of the Hyderabad State are not public documents within the meaning of S. 74 of the Evidence Act in the absence of proof that the originals of the documents have ever been filed in those proceedings.

The Advocate-General (Sir A. Krishnaswami Ayyar), V. Radhakrishnayya, B. C. Seshachala Ayyar, K.R. Rajagopalan and *P.J. Reddi* for Appellant.

S. Srinivasa Aiyangar, T.R. Venkatarama Sastri, N.C. Vijiaraghavachariar, A.D. Sitaraman and *A.C. Sampath Aiyangar* for Respondent.

K.S.

Burn, J. Nagier *v.* Parvathiammal.
6th November, 1940. S.A. Nos. 924 and 1070 of 1937.

Civil Procedure Code (V of 1908), S. 16—Suit by Hindu wife for separate maintenance—Prayer that a charge may be created over certain immovable properties of the husband—Suit if can be instituted in the Court within whose jurisdiction the immovable properties were situated.

Where in a suit against her husband for separate maintenance a Hindu wife prays that a charge may be created over certain immovable properties of the husband the suit may be instituted under S. 16, C. P. Code, in the Court within whose jurisdiction the immovable properties are situate though the cause of action did not arise therein.

42 L.W. 647, followed.

K. V. Srinivasa Aiyar for Appellant.

V. Meenakshisundaram for Respondent.

K.S.

Patanjali Sastri, J. Chidella Veerayya *v.* Kallam Koti Reddi, Official Receiver, Guntur.
8th November, 1940. C.R.P. No. 26 of 1938.

Provincial Insolvency Act (V of 1920), Ss. 5, 37 and 43—Powers of review—O. 47, r. 7, C.P.Code—Appealability of order refusing review—Revesting of properties under S. 37 long after absolute annulment under S. 43—Rights accruing meanwhile.

After an unconditional order of annulment under S 43 a creditor applied for review of the order under O. 47, C.P. Code, which was refused. He preferred an appeal under S. 75 (1) to the District Judge who directed the vesting of the properties under S. 37. On revision to the High Court,

Held, (1) that an appeal lies to the District Court under S. 75, Cl. (1) of the Provincial Insolvency Act from every order of the Insolvency Court;

(2) that S. 5 of the Provincial Insolvency Act makes the review provisions applicable to the Insolvency Court;

(3) that an appeal can be preferred by an aggrieved person and he is not barred from appealing from the order refusing to review. A.I.R. 1935 Pat. 177, dissented from;

(4) that orders of revesting can be made subsequent to the date of annulment. (1938) 1 M.L.J. 824, followed;

(5) but such revesting cannot affect transactions with respect to the property of the insolvent between the date of annulment and the date on which the property is revested in an appointee under S. 37.

K. Krishnamurthy, for Petitioner.

B.V. Ramanarsu for Respondent.

K.S.

Wadsworth, J. Singachala Ramier *v.* Anantakrishna Aiyar.
8th November, 1940. C.R.P. No. 1822 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 9—*Mode of working out.*

The proper mode of working out liabilities with reference to S. 9 of Madras Act IV of 1938 is as follows:

(1) Calculate interest on the debt at 5 per cent. per annum.

(2) Credit to the amount of interest so calculated the payments actually made or appropriated towards interest.

(3) Give a decree for any balance of interest thus calculated together with whatever is due for principal—no credit being given towards principal on account of any excess payments towards interest resulting from the scaling down process. C.R.P. No. 486 of 1939, followed.

A payment in full discharge of outstanding interest is a payment towards interest.

Decisions regarding the effect of appropriations under S. 8 are not applicable to a case under S. 9 of the Act.

T. M. Ramaswami Aiyar for Petitioner.

K. R. Rangaswami Aiyangar for Respondent.

K.S.

The Chief Justice and Horwill, JJ. Mask & Co. *v.* Vedachala Mudaliar.
8th November, 1940. C.M.P. No. 2811 of 1940.

Court-fees—Court's inherent power to order refund of court-fees—When exercised.

In an appeal in the High Court reversing the dismissal of a suit by the trial Court on the ground that there was no right of suit, the suit was remanded for trial on the merits. An appeal was preferred to the Privy Council. A stay prayed for by the defendant in the trial Court was opposed by the plaintiffs and was not granted and the suit was decided against the plaintiffs. Thereupon an appeal was preferred to the High Court and was pending when the decision of the Privy Council was announced deciding that there was no right of suit, which meant that the appeal could not be proceeded with. The appellant then applied for an order under the Court's inherent powers for the refund of the court-fees paid on the appeal,

Held, the appellants having opposed the application for stay and insisted that the suit should proceed notwithstanding that the appeal was pending in the Privy Council, there was no reason whatever for the Court to exercise its inherent powers to order refund of court-fees.

K. Bhashyam and *T.R. Srinivasan* for Petitioner.

Respondent not represented.

K S.

The Chief Justice and Krishnaswami Aiyangar, J. Ramalingam Chetti *v.* Rudra Goundan.
13th November, 1940. C.M.P. No. 4631 of 1940.

Madras Debt Conciliation Act (XI of 1936), *Ss.* 10 (1) *and* 23—*Creditor duly filing his statement of claim—Failure of creditor to produce accounts—Absence of creditor at hearing—Board declaring debt discharged—Legality of order—Review under S.* 23—*Availability of remedy—Effect on right to issue of* writ of certiorari.

After a statement of claim has been filed by a creditor before the Board under S. 10 (1) of the Debt Conciliation Act, the Board has no longer jurisdiction to declare the debt as discharged under S. 10 (2). Where after filing such a statement the Board declares the debt discharged

on the ground of the creditor's absence at the adjourned hearing and failure to produce account books, the order is unlawful and must be quashed by a *writ of certiorari*. The provision for review under S. 28 of the Act would not be such suitable or other remedy as to disentitle the creditor to the issue of a writ.

D. Ramaswami Aiyangar for Petitioner.

T. G. Raghavachariar and *P. Srinivasa Aiyangar* for Respondent.

K.S.

Wadsworth, J.
14th November, 1940.

K. Krishna Menon *v.* P. Raman *alias* Sankunni Moothan and two others.
C.R.P. No. 1730 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 15—Tenant mortgaging demised property with possession directing mortgagee to pay michavaram—Mortgagee if entitled to deposit arrears for fasli 1346 and claim the benefits under S. 15 of the Act.

A tenant's mortgagee with possession of the demised property cannot be deemed to be the tenant liable to pay the rent to the jenmi and there is no privity of estate or contract between the mortgagee and the jenmi. Where a deposit of a michavaram for 1346 fasli is made merely to safeguard the interest of the mortgagee and not on behalf of the tenant the mortgagee is not entitled to claim the relief under S. 15 of Act IV of 1938.

A. P. Kuttisankara Menon for Petitioner.

C. D. Venkataraman for Respondents.

K.S.

Pandrang Row and King, J.
18th November, 1940.

S. T. A. L. Alagappa Chettiar *v.* S. T. M. R. Virappa Chettiar and others.
Appeals Nos. 11 and 12 of 1937.

Civil Procedure Code (V of 1908), S. 73—Attachment before judgment of judgment-debtor's decree—Attachment ordered before judgment but effected after judgment—Whether an attachment within the meaning of O. 21, r. 53 (3)—Pendency of suit no excuse to a decree-holder from executing his decree—Limitation Act (IX of 1908), Art. 182 (5).

Where a decree-holder shortly before obtaining a decree had applied for attachment before judgment of another decree which his judgment-debtor had obtained and the attachment though ordered soon after, was effected actually some days after the judgment was passed, and was made absolute some months later, in an application for executing the decree made 5 years after its date and for a share in the rateable distribution of certain assets in deposit in Courts,

Held, that though attachment was ordered before judgment still as it was effected after judgment it was permissible to look upon it as an attachment in execution and though that attachment in consequence gave a right to the decree-holder, under O. 21, r. 53 (3), Civil Procedure Code, to execute the attached decree or to share in the realisations therefrom, nevertheless the execution of the decree in regard to any other asset should be deemed to be barred, because no application in execution had been made for 5 years.

Held also, that the pendency of a proceeding in regard to an attached property which was intended to make it available for the creditor, was no excuse to the decree-holder for not making his application earlier and the decree-holder's coming on the record of those proceedings and taking an interest in their prosecution could not be looked upon as a step-in-aid of execution so as to save the later application from the bar of limitation.

R. Gopalaswami Aiyangar for Appellant.

R. Kesava Aiyangar for Respondent.

K.C.

Abdur Rahman, J.
24th October, 1940.

V. K. Govindan Nair *v.* The Maharaja of Cochin.
S.A. No. 55 of 1938.

Landlord and tenant—Claim for rent—Landlord if entitled to charge on improvements effected on the land by the sub-tenant.

A landlord would have no right to ask for a charge as against the improvements effected by his own tenant, much less could he ask for it as against the improvements effected by a sub-tenant.

Case-law considered.

V. Radhakrishnayya and *K. P. Ramakrishna Aiyar* for Appellant.

V. Karunakara Menon for Respondent.

K.S.

Venkataramana Rao, J.
25th October, 1940.

Krishna Pattar *v.* Kunhunni Elaya Nayar.
S.A. No. 526 of 1937.

Pledge—Deposit of share certificates of company—If creates a valid pledge of such shares.

As the law stands at present in India, a mere deposit of share certificates would not be enough to create a valid pledge. In order to constitute a valid delivery of the shares the pledgee must be put in control of the thing pledged so that he may effectively exercise the power of sale.

Case-law (English and Indian) discussed.

C. S. Swaminathan for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S.

Abdur Rahman, J.
29th October, 1940.

Subbayyan Chettiar *v.* Ponnuchami Chettiar.
S.A. No. 225 of 1938.

Settlement deed—Properties given to wife for her maintenance for life—Death of settlor—Subsequent unchastity—If involves divestiture of life estate—Burden of proof for setting aside settlement.

The burden of proving that recitals in a settlement deed are not correct and that the deed is invalid for want of consideration, is on the persons who allege that the deed is not binding on them. 55 M.L.J. 768, relied on. By the settlement properties were given by the settlor to his wife "to live in and enjoy for her maintenance". It was established that she had become unchaste after the lifetime of her husband and it was contended that the life estate was forfeited by her on account of misconduct.

Held, in the absence of any *dum casta* clause in the settlement deed under which the property had come to vest in the wife for her life, no forfeiture can be found to have been incurred by her on the ground of her subsequent unchastity.

A person who wants an agreement on conveyance to be declared invalid on account of its being opposed to public policy has to prove the grounds which would bring it under S. 23, Indian Contract Act.

B. Sitarama Rao for Appellant.

K. Narasimha Ayyangar for Respondent.

K.S.

Abdur Rahman, J.
5th November, 1940.

Kasi Chettiar *v.* Secretary of State for India in Council and others.
S.A. No. 1035 of 1937.

Practice—Appeal—Official Receiver in insolvency refusing to appeal—Creditor if entitled to appeal.

N R C

An Official Receiver having failed in a suit to set aside a sale and in the first appeal thereon, a creditor obtained leave of the High Court to appeal in his own name on an *ex parte* application and filed the second appeal. On the question of the *locus standi* of the appellant (creditor) to file the appeal,

Held, the Official Receiver is not a representative of the creditors and it is not possible for the creditors to ignore him or act independently of him and file an appeal against a decision which the Official Receiver refuses to appeal against. In a suit on behalf of the estate of the insolvent the Official Receiver appears in his individual capacity and a creditor has no independent right of appeal against the decision.

57 Mad. 670, followed.

The leave to file the appeal granted to the creditor *ex parte* in the High Court cannot prejudice the interests of those against whom the order was passed. The proper course for such a creditor wishing to appeal is to move the Insolvency Court under S. 68 of the Provincial Insolvency Act and to apply for a reversal of the refusal of the Official Receiver to prefer an appeal to the High Court or for a direction to him to appeal or in the alternative ask for permission to appeal in the name of the Official Receiver.

K. S. Champakesa Aiyangar for Appellant.

The Government Pleader (*B. Sitarama Rao*), *K. Rajah Aiyar* and *R. Rangaswami Aiyangar* for Respondents.

K.S.

Abdur Rahman, J.
5th November, 1940.

Vattappa Kone and another *v.* Muthukaruppan Servai.
S.A. No. 1071 of 1937.

Tort—Malicious prosecution—Verbal complaint to village magistrate charging the plaintiff with robbery—If absolutely privileged.

A verbal complaint was made by the defendant against the plaintiff to a village magistrate charging the plaintiff with the offence of robbery. The village magistrate sent a report on the same day to the police and to the stationary sub-magistrate. The Magistrate ordered an enquiry by the police which subsequently made a report that the complaint was false. The plaintiff was not even summoned. The Magistrate thereupon declined to take any further action and proceedings were dropped. In a suit for damages for malicious prosecution,

Held, (*i*) as the plaintiff was not prosecuted he could not bring an action for damages for malicious prosecution. 37 Mad. 181; 49 Mad. 315 and 24 L.W. 22, relied on.

(*ii*) The statement or complaint is absolutely privileged, (1940) 2 M. L.J. 556.

(*iii*) As the occasion was privileged no action for damages for defamation will lie.

T. R. Srinivasan for Appellants.

R. Srinivasa Aiyangar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
7th November, 1940.

Maruthuvamalai Mooppanar *v.* Avadaiachi.
A.A. No. 205 of 1939.

Civil Procedure Code (V of 1908), O. 21, r. 19—Cross-decrees—Execution—Limitation.

When the decree provides for the recovery of sums by two parties one against the other, it is only the party to whom the larger amount is due who is entitled to execute the decree and limitation cannot run against the person who is entitled to the lesser decree at a time when that decree is not executable having regard to the provisions of O. 21, r. 19.

G. Srinivasa Aiyar for Appellant.

T. G. Raghavacharvar for Respondent.

K.S.

Abdur Rahman, J. Syed Ghouse Sahib *v.* Mohamood Khan Sahib.
8th November, 1940. S.A. No. 391 of 1935.

Madras Estates Land Act (I of 1908), S. 56—Ryots in possession of joint holding—Pattas not tendered to all the ryots—Suit under S. 56 to enforce acceptance of patta—Maintainability.

The right of suit to enforce acceptance of patta arises to a landlord only after the patta has been tendered by him to his ryot and, if the holding is joint, to the several ryots who hold the same jointly (1 Mad. 45 and 13 Mad. 42, relied on). One of the joint pattadars cannot be held to be the agent of the others for tendering pattas. The omission to give notice goes to the root of the case. There is no right of suit against a ryot against whom the patta was not served.

C. S. Venkatacharvar and *D. Ramaswami Aiyangar* for Appellant.

B. Poker for Respondent.

K.S.

The Chief Justice and Krishnaswami Aiyangar, J. C.M. Paru Amma *v.* Kelu Kurup.
12th November, 1940. L.P.A. No. 68 of 1939.

Transfer of Property Act (IV of 1882), Ss. 76 (h) and 77—Usufructuary mortgage—Mortgagee to utilise the profits towards interest and pay rent to superior landlord—Failure to pay rent—Decree obtained by superior landlord for arrears of rent and eviction—Decree not executed and becoming barred—Redemption by mortgagor—If mortgagee bound to account for arrears of rent not paid.

Plaintiff sued to redeem a usufructuary mortgage of 1894 in which the defendant-mortgagee was allowed to utilise the profits towards the interest due to him but was directed to pay the rent due to the superior landlord the *jenmi* every year. The mortgagee failed to pay the rent due to the *jenmi* and the *jenmi* filed a suit against the mortgagor and the mortgagee for eviction and obtained a decree therefor. The *jenmi* failed to execute the decree and the same became barred by limitation. In 1938 the plaintiff sued to redeem the mortgage praying that the defendant should account to him under S. 76 (*h*) of the Transfer of Property Act for the arrears of rent not paid by him to the *jenmi* which he was bound to pay out of the profits of the property.

Held, that the mortgagee was not bound to account as there was a contract to the contrary within the meaning of S. 77, Transfer of Property Act and the decision in 57 M.L.J. 800 will not apply to this case.

K. P. Ramakrishna Aiyar for Appellant.

P. Govinda Menon, C. S. Krishnamurthi Aiyar, C. M. Balakrishnan and *V.P.K. Nambiar* for Respondent.

K.S.

The Chief Justice and Krishnaswami Aiyangar, J. Palaniappa Chettiar *v.* K. Periasami Konar.
14th November, 1940. L.P.A. No. 76 of 1939.

Mortgage—Covenant to redeem after paying mortgagee's money—If personal covenant to pay—Suit for money—If sustainable.

A deed of mortgage stated as follows: "In any year after giving you notice in Panguni, and after paying your money in Chitrai I shall redeem the properties". On a question whether there was an unconditional undertaking to pay,

Held, that there was no enforceable covenant to pay and the suit for money was unsustainable.

Decision of Wadsworth, J., in S.A. No. 640 of 1935, affirmed.

A. C. Sampath Aiyangar and *T. K. Sundararaman* for Appellant.

T. R. Ramabhadrachariar for Respondent.

K.S.

Burn and Mockett, JJ. Public Prosecutor *v.* Venkatasubramanyam.
18th November, 1940. Crl. R.C. No. 799 of 1940.
(Crl.R.P. No. 753 of 1940).

Madras Children Act (IV of 1920), Ss. 3 and 22—Conviction for murder—Accused under 16 years at date of offence and over 16 at time of conviction—Proper sentence.

Where an accused who was convicted for murder though under 16 years of age at the time of the offence was over 16 years at the time of trial of the case, he cannot be called a "young person", and S. 22 of Act IV of 1920 did not impose any bar against sentencing him to death or transportation. It is the time of the conviction and not the time of the commission of the offence that is important.

Youth alone is not a reason for mitigating punishment but as the offender was below 18 years, a sentence of transportation for life was proper.

The Public Prosecutor in person.

C. K. Venkatanarasimham for Accused.

K.S.

Wadsworth, J. Muthuswami Chettiar *v.*
18th November, 1940. Narayanaswami Chettiar.
C.R.P. No. 1001 of 1937.

Civil Procedure Code (V of 1908), O. 1, r. 10 and O. 34, r. 1—Suit on mortgage by adopted son of deceased mortgagee—Person recognised by a compromise as entitled to half of the mortgagee's property in a prior suit challenging adoption—Right to be added as party in mortgage suit.

The property of a deceased mortgagee was claimed by an alleged adopted son and *X* another claimant challenged the adoption in a suit. By a compromise in the suit the adopted son and *X* were recognised as entitled to a half-share each in the properties of the deceased mortgagee. In a suit on the mortgage by the adopted son *X* claiming that he was entitled to half of the mortgage amount applied under O. 1, r. 10, C. P. Code, to be impleaded as a party.

Held, although the claim of *X* is adverse to the plaintiff it is one which ought to be decided before a decree was given in the mortgage suit. Otherwise the mortgagor would be liable to another suit on the same mortgage and the decree in the plaintiff's suit would not enable the mortgagor to satisfy the claim under the mortgage by payment of the amount due to the plaintiff. O. 34, r. 1 requires that all persons having an interest in

the mortgage security shall be joined as parties to any suit relating to the mortgage. Accordingly *X* is entitled to be added as a necessary party to the suit.

N. Muthuswami Aiyar and *S. Srinivasan* for Petitioner.

M. L. Nayak and *T. K. Rajagopalan* for Respondent.

K.S.

The Chief Justice and Krishnaswami Aiyangar, J. *20th November, 1940.* — P. Venkatasubbiah Chetty and others *v.* Jamuna Mosque by trustees. L.P.A. No. 33 of 1939.

Evidence Act (I of 1872), S. 32 (3)—Statement of mortgagor embodied in a compromise in a suit against him—Admissibility in suit for redemption.

Three usufructuary mortgages dated 1850, 1860 and 1864, were assigned in 1878 to the predecessor of the appellants. The respondents who claimed to redeem them were the trustees of a mosque. The only evidence of the title of the trustees was a compromise embodied in a decree against the mortgagor and in favour of some Muhammadans representing the mosque in 1875.

Held, that the statement of the mortgagor in the compromise was admissible under S. 32 (3) of the Evidence Act.

Held also, that Art. 134 barred the redemption of item I in suit though the said item was mortgaged by way of conditional sale in 1875 as the later transfer deed purported to be of an absolute interest and not of a mortgagee's interest. 1 Mad. 1, referred to.

K. Bashyam Aiyangar, M.S. Venkatarama Aiyar and *V. Ganapathi Ayyah* for Appellants.

K.V. Krishnasami Aiyar and *T. R. Ramabhadrachariar* for Respondent.

K.S.

Wadsworth, J. *21st November, 1940.* — Ramaswami *v.* Venkatareddi. C.R.P. No. 1012 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), S. 4, Cl. (h)—Promissory note in favour of woman endorsed for collection only after 1st October, 1937—If exempt from scaling down provisions.

A promissory note dated 4—8—1935 (in renewal of earlier ones) executed in favour of a woman was endorsed to the plaintiff for collection only, on 25—2—1938. In a suit on the promissory note in an application for scaling down the debt,

Held, the endorsement being for collection only, made on 25—2—1938 the debt was one due to a woman on 1st October, 1937, under S. 4, Cl. (*h*) of Act IV of 1938 and cannot be scaled down.

K. Krishnamurthy for Petitioner.

K. Bhimasankaram for Respondent.

K.S.

Patanjali Sastri, J. *22nd November, 1940.* — Sambamurthi Gurukkal and others *v.* Shanmugam Pillai and others. S.A. No. 12 of 1938.

Madras Hindu Religious Endowments Act (II of 1927), S. 48 (1)—Power of trustees to prescribe fees to be paid by worshippers to archakas.

The trustees of a temple prescribed the fees to be paid by the worshippers to the archakas for performing 'ashtotharam'. In a suit by the archakas to restrain interference with their *mamool* rights,

Held, the trustees had disciplinary control over the archakas and the trustees were within their powers to regulate and control the affairs of the temple.

K. V. Sesha Aiyangar and *R. Venkatachari* for Appellants.

K. Bhashyam and *K. Srinivasan* for Respondents.

K.S.

Patanjali Sastri, J. The Municipal Council, Dindigul *v.*
22nd November, 1940. Syed Ismail Saheb.
S.A. No. 13 of 1938.

Madras District Municipalities Act (V of 1920), S. 269—"Trade of butcher"—Meaning.

Mullas appointed by the kazi to administer the first cut after invoking the name of the prophet in slaughtering animals brought to the slaughter house were persons liable to take out licences as provided in S. 269 of the District Municipalities Act. The expression "trade of a butcher" includes the killer of the animals for the market as well as the seller of the meat for human consumption.

K. Rajah Aiyar and *V. Seshadri* for Appellant.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Respondent.

K. S.

The Chief Justice and Happell, J. Narayanaswami Aiyar (Special
25th November, 1940. Receiver) *v.* Soundappa Goundar.
L.P.A. No. 9 of 1940.

Res judicata—Suit filed by mortgagee—Adjudication of mortgagor as insolvent—Application by special receiver in insolvency for setting aside mortgage as without consideration—Suit and application heard together—Suit decreed and application dismissed—Appeal only from order dismissing application—If barred by decree in suit.

After a suit was filed by a mortgagee the mortgagor was adjudged insolvent and the special receiver applied for setting aside the mortgage as one without consideration under Ss. 4 and 53 of the Provincial Insolvency Act. The suit and application were heard together and the suit was decreed and the application dismissed. An appeal was filed from the order dismissing the application, no appeal having been preferred against the decree in the mortgage suit.

Held, as the application and suit were heard and disposed of at the same time and an appeal was filed from the order on the application, the mortgage decree did not become final and conclusive to operate as *res judicata* in the appeal. 29 Mad. 338 (F.B.), followed.

K. Bhashyam, C.V. Subramania Aiyar and *T.R. Srinivasan* for Appellant.

K. V. Krishnaswami Aiyar and *M. Krishna Bharati* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
4th November, 1940.

Vinayaka Rao Sahib Bhonsle *v.* The Junior Prince's Estate by Official Receiver, West Tanjore.
A.A.O. No. 441 of 1938.
(converted into C.R.P. No. 1859 of 1940).

Madras Agriculturists' Relief Act (IV of 1938), *S.* 21—*Insolvency of father—No bar to son's right to apply under the Act for scaling down.*

The insolvency of a father does not prevent the son from applying for the benefits of Act IV of 1938 by reason of S. 21. (1940) 2 M.L.J. 891, approved.

S. V. Venugopalachari for Appellant.

K. S. Desikan for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
5th November, 1940.

Vasireddi Pitchayya *v.* Lavu Subbayya.
A.A.O. No. 86 of 1939
(converted into C.R.P. No. 1865 of 1940).

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 19 *and* 20—*Debt due by members of a partnership firm—Agriculturist member—Right to have debt scaled down.*

A debt incurred by a partnership is really a debt incurred by the partners for which each of them is liable and where a partner so liable is an agriculturist, he is entitled to apply under Ss. 19 and 20.

K. Kotayya for Appellant.

Ch. Raghava Rao for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
5th November, 1940.

Ramaswami Gounder and another *v.* T.S.P.L.S. Thimmappa Chettiar and others.
A.A.O. No. 128 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 23 *and* 19—*Application under—If applicant must show that he has applied under S.* 19 *of the Act.*

An applicant under S. 23 of Act IV of 1938 must show that he is an agriculturist entitled to the benefits of the Act, but he need not show that he has already applied to the Court for those benefits. It is not essential that the applicant should have actually instituted proceedings under S. 19.

T. V. Ramanatha Aiyar for Appellant.

K. R. Rangaswami Aiyangar and *R. Gopalaswami Aiyangar* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
5th November, 1940.

Ramanathan Chettiar *v.* Seetharama Aiyar.
A.A.O. No. 134 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 3—*Firm of money-lenders—If an "Agriculturist".*

It is clear with reference to the definitions in S. 3 of Madras Act IV of 1938 that a firm of money-lenders cannot be an agriculturist.

V.T. Rangaswami Aiyangar and *K. S. Sankararaman* for Appellant.

A. K. Sriraman for Respondent.

K.S.

N R C

The Chief Justice and Krishnaswami Aiyangar, J.
12th November, 1940.

Ramaswami Aiyar (Receiver) *v.* Veerarayan Raja and another.
L.P.A. No. 71 of 1938.

Practice—Presentation of plaint to Court of Subordinate Judge—Return for presentation to Court of lower pecuniary jurisdiction—Suit if can be deemed to be instituted on the date of presentation to Subordinate Judge's Court.

Where a plaint is presented to a Court having jurisdiction and that Court accepts the plaint as being in order it must be held that the suit has been instituted. Because at some later stage, as the result of a finding of fact on the question of the value of the subject-matter of the suit it is found that the plaint should have been presented to another Court having jurisdiction and that the plaint has been returned for presentation in that Court it does not mean that the suit has not been instituted. When a plaint has been presented to a Court having jurisdiction a transfer of the case to another forum cannot mean the cancellation of the institution of the suit.

Decision of King, J., affirmed. 52 Bom. 548, distinguished.

P. Govinda Menon for Appellants.

Respondent not represented.

K.S.

Patanjali Sastri, J.
12th November, 1940.

Tiyyagura Chellamayya *v.* Bommu Pulla Reddi.
S.A. No. 150 of 1938.

Hindu Law—Adoption—Consent of sapindas—Validity.

The sapindas executed a document in favour of a childless widow in the following terms:—

"We hereby authorize you that during your life you may bring a young boy and adopt him. We have therefore executed this deed of our permission so that you may bring any boy you like and adopt him".

An adoption was made within a short time after the execution of the document.

Held, that the adoption based on such authority was valid in the circumstances. 1914 M.W.N. 620, followed; 26 Mad. 681; 1914 M.W.N. 502 and A.I.R. 1925 Mad. 67, distinguished.

K. Kottayya for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

Patanjali Sastri, J.
12th November, 1940.

Parvateesam *v.* Krishnachandra Gajapathi.
S.A. No. 1127 of 1937.

Survey and Boundaries Act—Dispute as to correctness of survey demarcation of 1910-1912—Whether provisions of 1897 Act or 1923 Act applicable.

Where the survey the correctness of which is in dispute had taken place during 1910-1912 the question whether it is binding on the parties has to be determined with reference to the provisions of the Act of 1897 which was then in force.

V. Govindarajachari for Appellants.

P. V. Rajamannar and *K. Subba Rao* for Respondent.

K.S.

The Chief Justice and Krishnaswami Aiyangar, J.
18th *November*, 1940.

Arunachalam Chettiar *v.* Ramanujachariar.
Crl.M.P. No. 1160 of 1940.

Contempt—Failure of special receiver to comply with order of District Court to deposit moneys of insolvent estates in his hands into Court—Application to commit for contempt—Propriety.

S. 2 (3) of the Contempt of Courts Act provides that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code. Accordingly where an application to commit for contempt was preferred against a special receiver for failure to comply with the order of the District Judge to pay into Court certain moneys in his hands belonging to insolvent estates,

Held, that the application was an abuse of process of Court and must be dismissed and the petitioner should pay the respondent his costs, Rs. 150.

K. Sankara Sastri for Petitioner.

S. S. Ramachandra Aiyar for Respondent.

K.S

The Chief Justice and Krishnaswami Ayyangar, J.
14th *November*, 1940.

Suryanarayanamurthy *v.* Venkamma and another.
L.P.A. No. 74 of 1939.

Will found to be invalid—If can be given effect to as family settlement.

Where a father and son are the only coparceners and a will by the father is attested by the son and his consent to the dispositions in the will is proved, though the will itself is found to be invalid it can be given effect to as a family settlement.

48 All. 313, followed.

Decision of Patanjali Sastri, J., affirmed.

Ch. Raghava Rao for Appellant.

V. Govindaraja Chari and *V. V. Sastri* for Respondent.

K.S.

Somayya, J.
14th *November*, 1940.

Muthuswami Naidu *v.* Sonaimuthu Servai and another.
C.R.P. No. 950 of 1938.

Promissory note—Consideration, withdrawal of prosecution against a third person by the plaintiff—Inability to withdraw prosecution as Court refused to permit the case to be compounded—Enforceability of promissory note.

The consideration for a promissory note was the withdrawal of the prosecution against a third person by the plaintiff. The Court did not permit the criminal case to be compounded and the prosecution ended in a conviction. In a suit to enforce payment under the promissory note,

Held, that the consideration for the promissory note had failed and the suit must be dismissed.

T. S. Vaidyanatha Aiyar for Petitioner.

N. Somasundaram for Respondent.

K.S.

Mockett, J. Chidambaram Pillai *v.* Sivasubramania Gomathi.
15th November, 1940. **O.R.P. No. 983 of 1938.**

Civil Procedure Code (*V of* 1908), *O.* 47, *r.* 1—*Review—"Other sufficient reasons"—Meaning—Omission of Judge to consider a decision—If ground for review.*

The successor of a Subordinate Judge reviewed his predecessor's order on the ground that his predecessor's attention had not been drawn to a decision of the Judicial Committee, which he considered rendered his predecessor's judgment wrong. On revision,

Held, powers of review are confined to those set out in O. 47, r. 1, C.P. Code. The expression "other sufficient reasons" in O 47, r. 1, means reasons analogous to the specific reasons set out in the rule. The omission to consider a decision however regrettable, however wrong cannot constitute an error apparent on the face of the record and cannot constitute a ground for review.

K. V. Sesha Aiyangar, N. S. Mani and *T. Nallasivan Pillai* for Petitioner.

K. Kuttikrishna Menon for Respondent.

K.S.

Wadsworth, J. Maharaja of Pithapuram *v.*
19th November, 1940 Mangamma and others.
O.R.P. No 1209 of 1939.

Madras Estates Land Act (*I of* 1908), *Ss.* 124 *and* 163-*A*—*Purchase by landlord under sale for arrears of rent—Claim for mesne profits till delivery—If cognisable in Civil Court.*

S. 163-A of the Madras Estates Land Act is not intended to provide a machinery for collecting mesne profits from unauthorised occupants except as incidental to their eviction by suit. When a landlord has purchased the properties at a revenue sale but refrained from taking proceedings under S. 124 of the Act for taking delivery it is reasonable to draw the inference that he is prepared to accept the rent and damages which can be claimed under S. 163 from the actual occupant during the interval between the sale and delivery. After possession is surrendered he cannot bring a suit for mesne profits in the ordinary Civil Courts and the landlord is confined to the special remedy provided by the Act.

Ch. Raghava Rao for Petitioner.

K. Bhimasankaram for Respondent.

K.S.

The Chief Justice and Happell, J. Ganta Bangarigadeo *v.* Paltimo
21st November, 1940. Atchutharamayya.
L.P.A. No. 6 of 1940.

Madras Estates Land Act (*I of* 1908)—*Patta for one year if requires registration—S.* 52 (3)—*Patta if remains in force after one year—Suit for possession by such tenant against trespassers after one year—Landlord's acquiescence in suit—Suit if maintainable—Landlord added as a defendant only in second appeal more than twelve years after the date of trespass—S.* 22, *Limitation Act—If applicable.*

Where a landholder granted a patta to a person for one year and the land being in the possession of trespassers on the date of the lease the tenant instituted a suit in ejectment against the trespassers only after the expiry of the one year covered by the lease without making the landholder a party and the landholder on being added as party defendant in second

appeal more than twelve years from the date of the trespass signified his assent to the tenant getting possession,

Held, (*i*) that the patta being a lease for one year in the particular case did not require registration and that it continued in force until a new patta and muchilika were exchanged, by virtue of S. 52 (3) of the Madras Estates Land Act and that the tenant can maintain a suit in ejectment against trespassers;

(*ii*) that as the landholder had signified his assent to the tenant's getting possession the case fell directly within the ruling in 37 Mad. 281;

(*iii*) that S. 22 of the Limitation Act has no application to a case where a party is added as a defendant against whom no relief is claimed as it does not alter the nature of the suit.

V. *Subramanyam* and *B.V. Subramanyam* for Appellant.

P. Satyanarayana Rao for *P. Somasundaram* and *S. Ramamurthi* for Respondents.

K.S

Wadsworth, J.
21*st November*, 1940.

Venkatapayya Rao v. Rama Rao.
C.R.P. No. 971 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), S. 20—Stay of execution under—Power of Court to direct its officer to sell perishable property in its custody to prevent its deterioration.

Where there has been a stay of execution under S. 20 of Act IV of 1938 the Court can still direct its officer under O. 21, r. 43 of the Code to sell perishable property which is in the custody of the Court to prevent its deterioration. That is not an act in execution of the decree but an act in pursuance of the Court's responsibility for the safe custody of property held by it as a result of execution. The stay will not operate to prevent such a necessary action by the Court.

V. S. Narasimhachari for Petitioner.

P. Somasundaram for Respondent.

K.S.

Mockett, J.
22*nd November*, 1940

Sait Balakrishna Lal Janki Prasad *v.* Mangala Sengiah.
C.R.P. No. 664 of 1938.

Partnership Act (IX of 1932), S. 69—Suit by partners of dissolved unregistered firm against clerk for recovery of moneys misappropriated—Maintainability.

The member of a partnership could after dissolution, sue to recover a debt incurred before the dissolution as being a debt for which they were enabled to sue because it was expressly provided in S. 69, sub-S. (3) (*a*). I.L.R. (1938) Bom. 102, followed.

Where the suit is by a member of a dissolved unregistered partnership against a clerk for recovery of moneys misappropriated, the suit is not on contract but in tort. S. 69 of the Partnership Act relates only to right arising from a contract and it is not the intention of S. 69 to prevent unregistered firms recovering property from wrongdoers.

P.V. Subramanyam for Petitioner.

K. Krishnamurthi for Respondent.

K.S.

[F. B.]
The Chief Justice, Krishnaswami Aiyangar and Happell, JJ.
25th November, 1940.

In the matter of an Advocate.
Referred Case No. 28 of 1940.

Legal Practitioner—Addressing a letter to a clerk in a Magistrate's Office asking that an application filed by him should be dealt with urgently—Propriety.

It is improper for an advocate to address a letter to a clerk in a Magistrate's Office asking that an application filed by him should be dealt with urgently. The proper course for a legal practitioner, if there was any delay, is to bring the matter to the notice of the presiding officer of the Court.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) in support of the reference.

S. Krishnamurthi for Respondent Advocate.

K.S.

Krishnaswami Aiyangar, J.
26th November, 1940.

Stock and Share Exchange Bureau, Rawalpindi *v.* Kothari & Sons.
C.R.P. No. 837 of 1938.

Limitation Act (IX of 1908), Art. 164—Application for setting aside ex parte *decree—Starting point for limitation—"Knowledge of decree"—If means of knowledge equivalent to—Practice—Summons—"Duly served"—Meaning of within C.P.Code (V of 1908), O. 9, r. 13.*

Where the summons is served on a defendant too late to afford him sufficient opportunity of appearing at the hearing of the suit, it is not a case of a summons "duly served" within the meaning of O. 9, r. 13, C. P. Code. In such cases the Court ought to issue fresh summons. An omission on the part of such a defendant to prosecute inquiry which might have led to a knowledge of the date of hearing cannot be regarded as culpable or wilful so as to carry with it the consequence of "knowledge". Such a defendant will be within time if he applies for setting aside the *ex parte* decree within 30 days of actual knowledge of the decree.

S. Govind Swaminathan for Petitioner.

John and *Row* for Respondents.

K.S.

Burn, J.
28th November, 1940.

Sait Lalchand Kushalchand Firm *v.* Ramakoteswara Rao and others.
C.R.P. No. 8 of 1938.

Civil Procedure Code (V of 1908), S. 73—Amount realised by sale in execution of debtor's property, paid over to the Official Assignee under S. 53 of Presidency Towns Insolvency Act—Repayment to executing Court on annulment of adjudication—Person applying, if entitled to rateable distribution.

Amounts realised in execution after the presentation of a petition by the judgment-debtor for adjudication as an insolvent is not a realisation on account of the judgment-debtor, but belongs to the Official Assignee by virtue of S. 53 of the Presidency Towns Insolvency Act. Where after the annulment of adjudication the Official Assignee returns to the executing Court the amount of the realisations received by him from the executing Court on the adjudication, the amount is held by the executing Court for

the first time so as to be capable of distribution among the rival decree-holders as on that date.

V. Govindarajachari and *Kasturi Seshagiri Rao* for Petitioner.

C. Vasudevan for Respondents.

K.S.

King and Patanjali Sastri, JJ.
29th November, 1940.

Gadamsetti Pedda Subbarayudu and others *v.* Lingam Yella Somayya, being minor (by next friend Kotirike Ramakrishnayya) and two others.
Appeal No. 7 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 21—Insolvency of mortgagor and declaration of dividend in the insolvency—Purchasers of equity of redemption—Right to have mortgage decree scaled down.

Where a mortgagor has been adjudged insolvent and a dividend has been declared in the insolvency, the purchasers of the equity of redemption who are agriculturists are entitled to have the mortgage decree scaled down under Act IV of 1938.

Decision of Wadsworth, J., in *Sooryanarayana* v. *Ramamma,* (1939) 2 M.L.J. 291, approved.

K. S. Jayaram for Appellant.

V. Govindarajachari for Respondents.

K.S.

Lakshmana Rao, J.
29th November, 1940.

President, Pakkam Panchayat Board *v.* Muniswami Reddy.
Crl.R.C. No. 635 of 1940 and
Crl.R.P. No. 596 of 1940.

Madras Local Boards Act (XIV of 1920), S. 207—Accused found guilty of offence under S. 207—If can be acquitted on the ground that the result of his objection petition was not communicated to him.

Where an accused is found guilty of the offence under S. 207 of the Madras Local Boards Act, the fact that the result of his objection petition was not communicated to him is not a ground for acquitting him.

V. Ramaswami Aiyar for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

Accused (Respondent) not represented.

K.S.

Lakshmana Rao, J.
29th November, 1940.

Periannan Chettiar, Petitioner (Accused).
Crl.R.C. No. 1005 of 1940 and
Crl.R.P. No. 957 of 1940.

Companies Act (VII of 1913), S. 76 (2)—Default under—Ordinary director not knowingly and wilfully party to—If can be convicted for default.

Where an ordinary director living outside Madras was not knowingly and wilfully a party to the default under S. 76 (2) of the Indian Companies Act, it is not proper to convict him for that default.

G. N. Chary for Petitioner.

Crown Prosecutor for the Crown.

K.S.

Lakshmana Rao, J.
29th November, 1940.

Periannan Chettiar, Petitioner (Accused).
Crl.R.C. No. 1011 of 1940 and Crl.R.P. No. 962 of 1940.

Companies Act (*VII of* 1913), *S.* 133 (3)—*Ordinary director not knowingly and wilfully party to default under S.* 133 (3)—*Conviction—Propriety.*

Where an ordinary director of a company is not shown to have knowingly or wilfully been a party to a default under S. 133 (3) of the Companies Act he should not be convicted.

G. N. Chary for Petitioner.

Crown Prosecutor for the Crown.

K.S.

Lakshmana Rao, J.
4th December, 1940.

Kunhiraman Nair, *In re.*
Cr. Appeal No. 716 of 1940.

Indian Post Office Act (*VI of* 1898), *Ss.* 52 *and* 58—*Offence under S.* 52—*Sanction of postal authorities—If essential to confer jurisdiction on Court.*

A postman was charged with secreting postal articles, namely letters written to a lady by her lover. On a preliminary objection as to jurisdiction,

Held, that though for a prosecution under S. 58 of the Post Office Act the sanction of the Director-General of Posts and Telegraphs or the Post Master-General was necessary an offence under S. 52 of the Act with which the accused was originally charged did not require any such sanction and the Court had jurisdiction to try the case.

N. Somasundaram for the Crown.

K. S. Sundaram for Accused.

K.S.

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NOTES OF INDIAN CASES.

GOKUL CHANDRA DAS *v.* MANAGER, BENIACHANG MAJUMDARI WARD ESTATE, I.L.R. (1940) 1 Cal. 73.

The question considered in this case is whether a manager appointed by the Court of Wards of a ward's estate is a "public officer" within the meaning of S. 2 (17) of the Civil Procedure Code, and consequently whether a notice of suit should be given to him prior to the institution of a suit. The point arose under the Bengal Court of Wards Act (Bengal Act IX of 1879). The learned Judge has held dissenting from a previous decision of the same High Court in *Nanda Lal Bose* v. *Ashutosh Ghose*[1], that the manager of an estate under the Court of Wards is a "public officer" and that notice to him under S. 80 of the Civil Procedure Code, was a pre-requisite to the suit.

In coming to this conclusion the learned Judge has held that the manager is not a public officer within the meaning of S. 2 (17-g) of the Code and that he is not also an officer in the pay of the Government within the terms of S. 2 (17-h), but that he is an officer in the service of the Government under S. 2 (17-h), that therefore he is a "public officer" within the definition and that consequently two months' notice of suit to him is required under S. 80 of the Code.

It must be observed in this connection that a Collector acting as an agent of the Court of Wards is a public officer when he acts on behalf of the Court of Wards because it is by virtue of his office as Collector, he is under the Court of Wards Act functioning for the Court of Wards. See *The Collector of Bijnor, Manager of the Estate of Chaudhri Ranjit Singh* v. *Munuvar*[2]. It has been pointed out in that case that if the Collector had been appointed as a manager specifically, he would only be a private individual and he could not be acting in his official capacity as a manager under the Court of Wards. *See* Per Straight, J., at pp. 23 and 24 and Pearson, J., at p. 22 of *The Collector of Bijnor, Manager of the Estate of Chaudhri Ranjit Singh* v. *Munuvar*.[2] If this view is correct, when a private person who is not a Collector

1. A.I.R. 1920 Cal. 167 : 55 I.C. 515. 2. (1880) I.L.R. 3 All. 20 (F.B.).

has been appointed as a manager under the Court of Wards, it will not make any difference and he will not be a public officer and no notice will be required to him under S. 80 of the Code.

In this respect, the provisions of the Court of Wards Act of the other provinces are of some interest. The general lines of the other Court of Wards Acts are similar to those of the Bengal Act. S. 5 of the Madras Act enacts that the Board of Revenue should be the Court of Wards as does the Bengal Act by its 5th section. There is also provision in the Acts for the appointment of managers for the estates of disqualified proprietors. The powers and duties of such managers are also given in similar terms. There is, however, S. 30 of the Madras Court of Wards Act by which it is provided that every guardian, manager or other servant of the Court of Wards shall be deemed to be a "public servant" within the meaning of Ss. 161, 162, 163, 164 and 165 of the Indian Penal Code, and under the definition of legal remuneration contained in the said S. 161 the word "Government" shall for the purpose of this section be deemed to include the Court of Wards. There are similar provisions in the Court of Wards Acts of Bombay, the United Provinces and the Punjab. *See* S. 21 (2) of the Bombay Court of Wards Act of 1905, S. 33 of the United Provinces Court of Wards Act of 1912 and S. 42 of the Punjab Court of Wards Act of 1903. There is however no corresponding provision in the Bengal Court of Wards Act. It must be taken that the Madras, Bombay and the United Provinces Legislatures in enacting those sections must have done so in the view that the manager under the Court of Wards is not a public servant but for those provisions and that in other respects and for other purposes he is not a public servant. It is a well-known rule of statutory construction that when a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something else. *See* Per Cave, J., in *R.* v. *Norfolk, C. C.*[1]. See also *Green* v. *Marsh*[2]. It must be noticed that the definition of public servant in S. 21, cl. (9) of the Indian Penal Code, has words similar to S. 2 (17-h) of the Civil Procedure Code, that is "Every officer in the service. . . . . of Government", words which are relied upon by the learned Judge in this case for holding that the manager under the Court of Wards is a "public servant". If notwithstanding these words a manager under the Court of Wards Acts of Madras and other provinces is not a public servant under the Indian Penal Code, and a special section has to be introduced to constitute him as a public servant for certain purposes, it is open to the argument that without a

1. 60 L.J.Q.B. 380. 2. (1892) 2 Q.B. 330.

similar section in the Bengal Court of Wards Act, the manager under the Court of Wards would not be a "public servant" within the meaning of the Indian Penal Code, S. 21, cl. (9) or a "public officer" under S. 2 (17-h) of the Civil Procedure Code, and that the decision in *Nanda Lal Bose* v. *Ashutosh Ghose*[1], lays down the correct law on the point.

ABU SHAHID *v.* ABDUL HOQUE DOBHASH, I.L.R. (1940) 1 Cal. 110.

This decision brings out clearly the limits of the right to account between tenants in common. At common law, if one tenant in common occupied and took the whole profits, the other had no remedy against him whilst the tenancy in common continued unless he was put out of possession, when he might have his ejectment or, unless he appointed the other to be his bailiff as to his undivided moiety, and the other accepted the appointment, when an action of account would lie, as against the bailiff of the owner of the estate. This state of law continued until St. 4, Anne., Ch. 16 which by S. 27 provided that an action of account might be brought and maintained by a joint tenant or a tenant in common, his executors and administrators against the other for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant or tenant in common. By the effect of decisions, this section was restricted in its operation only to cases where the co-tenant received from a third person more than his just share of profits and it was understood not to extend to cases where the tenant in common was actually in occupation. In the latter case, that is, in the case where a co-tenant was in actual occupation, it was held by Baron Parke in *Henderson* v. *Eason*[2], that the other co-tenant had no right to account as it may be that the tenant in occupation may raise valuable crops by employing his capital and industry for which the other co-tenant did not contribute anything and it may also be that the tenant in possession may sustain a serious loss for which the other co-tenant may not be liable to contribute to any extent. Courts of Equity followed the provisions of the statute as they considered the rule of common law as inadequate to afford justice.

In India where there are no special rules of law on the subject, as in such a case, the rule of English law has been applied as being rules of equity and good conscience. See *Waghela Rajsanji* v. *Shekh Masludin*[3] and *Muhammad Raza* v. *Abbas Bandi Bibi*[4]. In this particular case, the rule of English common law as modified

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1. A.I.R. 1920 Cal. 167: 55 I.C. 515 2. (1851) 17 Q.B. 701: 117 E.R. 1451.
3. (1887) L. R. 14 I.A. 89: I.L.R. 11 Bom. 551 (P. C.).
4. (1932) 63 M.L.J. 180: 7 Luck. 257 (P.C.).

by the statute of Queen Anne and adopted by the Equity Courts has been accepted as the law, in the case under notice. The learned Judges have not clearly indicated whether they would extend the rule of accountability even to cases where the other co-tenant is in actual possession.

The next point dealt with in the case is the question of the proper article of limitation applicable to a suit for account against a tenant in common who had realised more than his share of the income from the common property. At one time it was held by the Indian Courts that the action to recover the excess collected by the other co-tenant was in the nature of one for money had and received for the plaintiff's use. Among the decisions which held to this effect were *Tellis* v. *Saldanha*[1], *Vaidyanatha Aiyar* v. *Aiyaswamy Aiyar*[2], *Ramalagu Servai* v. *Solai Servai*[3], *Avancha Lakshminarasamma* v. *Avancha Lakshamma*[4], *Binode Lal* v. *Preo Nath*[5], *Segu Chidambaramma* v. *Segu Balayya*[6]. See also *Banoo Tewary* v. *Doonoo Tewary*[7], *Mahomed Wahib* v. *Mahomed Ameer*[8], *Kundun Lal* v. *Bansi Dhar*[9], *Masih-uddin* v. *Imtiaz-un-nissa*[10], *Thakur Prasad* v. *Partab*[11], *Amina Bibi* v. *Najm-un-nissa Bibi*[12] and *Abdul Ghaffar* v. *Nur Jahan Begam*[13]. The learned Judges in these cases did not realise that there could be no action for money had and received between tenants in common. This was pointed out as early as 1850 by Baron Parke in *Thomas* v. *Thomas*[14]. These decisions came up for review before a Full Bench of five Judges of the Madras High Court in *Yerukola* v. *Yerukola*[15], where they laid down that no action for money had and received would lie between tenants in common and that therefore Art. 62 of the Limitation Act could not apply to a suit for account between tenants in common and that the proper article would be only 120 of the Limitation Act and that time would begin to run only when the account was demanded and refused. Where however a co-tenant acts as the agent of the other co-tenants, the suit for account would be governed by the special Art. 89 of the Limitation Act. The learned Judges in the case under notice have taken this view of the Madras Full Bench differing from the prior decision of the Calcutta High Court in *Banoo Tewary* v. *Doonoo Tewary*[7], which had been previously doubted by the Bombay High Court in *Gabu* v. *Zipru*[16].

1. (1887) I.L.R. 10 Mad. 69.
2. (1909) 19 M.L.J. 94: I.L.R. 32 Mad. 191.
3. (1921) 41 M.L.J. 274.
4. (1913) 25 M.L.J. 531.
5. (1917) 40 I.C. 173.
6. (1911) 2 M.W.N. 467.
7. (1897) I.L.R. 24 Cal. 309.
8. (1905) I.L.R. 32 Cal. 527.
9. (1880) I.L.R. 3 All. 170.
10. (1915) I.L.R. 37 All. 40.
11. (1884) I.L.R. 6 All. 442.
12. (1915) I.L.R. 37 All. 233.
13. (1915) I.L.R. 37 All. 434.
14. (1850) 5 Exch. 28.
15. (1922) 42 M.L.J. 507: I.L.R. 45 Mad. 648.
16. (1921) I.L.R. 45 Bom. 313.

SAIT SOGMULL LACHIRAM FIRM *v.* PARANDHAMAYYA, (1940) 2 M.L.J. 17.

S. 78 of the Provincial Insolvency Act has prescribed that the period between adjudication and annulment may be excluded in computing limitation for any suit or execution application which might have been brought but for the adjudication order, provided that the debt had been *proved* under the Act. S. 33 indicates that the proof should have been tendered *after* adjudication and S. 49 mentions the mode of such proof as the delivering or sending by post in a registered letter to the Court an affidavit verifying the debt. In England it has been held that admission of the debt by the insolvent will not be such proof, Ex parte *Revell*[1]. Even where the debt had ripened into a judgment before adjudication, the trustee in bankruptcy can challenge the reality of the consideration for the debt, Ex parte *Lennox*[2], Ex parte *Kibble*[3] and In re *Van Laun*: Ex parte *Pattullo*[4]. The same principles have been applied in India in a number of cases—see *Fazal Azim* v. *Tulsi Ram*[5], Re *an Advocate*[6], *Ram Lal Tandon* v. *Kashi Charan*[7] and *Sriput Singh* v. *Ram Sarup*[8], etc.

It has however been held that S. 49 is not exhaustive of the modes of proving a debt, *Fazal Azim* v. *Tulsi Ram*[5] and that it does not lay down any mode of proof that is mandatory, *Bhudermull* v. *Haji Mahomed*[9]. In fact S. 49 uses the word *may* and not *shall* as regards the mode of proof indicated there. In Madras, it has been held that obtaining a judgment on the debt subsequent to adjudication in proceedings to which the Official Receiver is a party is good proof though it is not the mode of proof specified in S. 49, *Ramalinga Aiyar Firm* v. *Rayalu Aiyar*[10]. Excepting for this, in all other cases, the Madras High Court has held that proof of debt for purposes of S. 78 should be in the mode set out in S. 49 and if proof has been lodged in conformity with that section it will suffice even if it has not been actually admitted by the Official Receiver, *Lakshmi Bai* v. *Rukmaji Rao*[11] and *Veerayya* v.

1. 54 L.J.Q.B. 92.
2. (1885) 16 Q.B D. 315.
3. (1875) 10 Ch. App 373, 377.
4. (1907) 1 K.B. 155, 162.
5. (1937) 171 I.C. 609: 1937 O.W.N. 1143.
6. (1931) 61 M.L.J. 229: I.L.R. 54 Mad. 601 (F.B.).
7. A.I.R. 1928 All. 380: 28 A.L.J. 241.
8. A.I.R. 1926 Cal. 982: 95 I.C. 463.
9. A.I.R. 1938 Pat. 65: 173 I.C. 988.
10. (1929) 58 M.L.J. 170: I.L.R. 53 Mad. 243.
11. (1934) 67 M.L.J. 45: I.L.R. 57 Mad. 767.

Narasimha Rao[1]. If the creditor has done all that he should do and there has been no refusal by the Official Receiver, the benefit of S. 78 will be available, *Rali Ram* v. *Sant Ram*[2]. In that view it has been held that mere admission of the debt by the insolvent in the course of the insolvency proceedings will not amount to the tender of proof under the Act, for purposes of S. 78, *Mannasao Kalesar Bani* v. *Rambharosa*[3], *Veerayya* v. *Narasimha Rao*[1] and *Fazal Azim* v. *Tulsi Ram*[4]. In the present case the Madras High Court has reaffirmed that view and held that a debt can be held proved only if proof has been given of the kind which will enable a creditor to qualify for obtaining dividend—a proof to which objection could be taken by the Official Receiver or any of the creditors, that is, proof as laid down in S. 49. The Calcutta High Court has taken a different view in *Krishna Chandra Das* v. *Jatindra Nath Porial*[5] and held that S. 49 has merely specified a simple but by no means the only mode of tendering proof and that proof of debt in the course of proceedings leading to or preceding adjudication will be sufficient proof for purposes of S. 78 also. The Calcutta view overlooks the words in the proviso to S. 78 that the proof should be "under this Act", and that proof under the Act is specified in S. 49 only. It is also opposed to the very object of the proviso and fails to note that proof for purposes of Ss. 11 and 24 is directed to the making out of the debtor's insolvency and has no other object to serve.

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1. (1937) 2 M.L.J. 883.
2. A.I.R. 1933 Lah. 101 : 142 I.C. 644.
3. A.I.R. 1934 Nag. 282 : 153 I.C. 533.
4. (1937) 171 I.C. 609 : 1937 O.W.N. 1143.
5. A.I.R. 1929 Cal. 159 : 48 C.L.J. 574 : 114 I.C. 415.

SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* HUSSAIN SAHEB, (1940) 2 M.L.J. 13.

This decision holds that at any rate with regard to a first grant, patta is given to the person to whom the Government has granted the land, that though a patta is not a title deed it is yet a document of title, and that on cancellation of a tree patta there is a resumption of its rights by the Government. If the suggestion be that as regards lands, cultivated as well as waste, the ryot always came into existence under a letting by the sovereign and that the latter is the owner of all lands, the conclusion is certainly debatable. It is opposed to the view in *Venkatanarasimha* v. *Dandamudi Kotayya*[1], *Lekkamani* v. *Puchaya*[2] and other cases. It also runs counter to the Hindu as well as the Mahomedan theories regarding the origin of property in land.

As to the evidentiary value of a patta, though it had been suggested in cases like *Freeman* v. *Fairlie*[3], *Mangamma* v. *Timmapaiah*[4] and *Subramaniam Chetty* v. *Mahalingaswami Sivan*[5], that it is not evidence of title but of possession only, it has now been recognised that the probative value of a patta varies according as the dispute is between the Government and a ryot or as between two rival ryots, and that in certain cases it will afford evidence of title also, *Donganna* v. *Jammanna*[6]. In *Gopal Chettiar* v. *Arasappa Pillai*[7], it has been held that a patta granted by a landholder to a ryot under the Madras Estates Land Act is strong *prima facie* evidence of title so as to entitle a transferee from the pattadar to claim the protection of S. 41 of the T. P. Act. In fact it may be sufficient evidence of title to create an equitable mortgage of property, *Official Assignee* v. *Badri Narain*[8].

As to the effect of cancellation of a tree patta it had been held in *Sengoda Goundan* v. *Varadappan*[9], that it merely puts an end to the revenue demand in respect of the trees and does not *ipso facto* operate as a resumption of its rights by the Government. That where the land pattadar and the tree pattadar were different persons, refusal to issue fresh tree pattas will not extinguish the tree pattadar's rights was the view of Ramesam, J., in *Chinnappa*

1. (1897) 7 M.L.J. 251: I.L.R. 20 Mad. 299.
2. (1870) 6 M.H.C.R. 208.
3. 1 Moo.I.A. 305.
4. (1866) 3 M.H.C.R. 134.
5. (1909) 19 M.L.J. 627: I.L.R. 33 Mad. 41 (F.B.).
6. A.I.R. 1931 Mad. 613: 133 I.C. 782.
7. (1940) M.W.N. 190: 51 L.W. 351: A.I.R. 1940 Mad. 523; see also *Srinath Ray* v. *Maharaj Pratap*, (1923) M.W.N. 702: 28 C.W.N. 145 (P.C.).
8. (1924) 48 M.L.J. 423: I.L.R. 48 Mad. 454.
9. (1911) 22 M.L.J. 201: I.L.R. 36 Mad. 148.

Naidu v. Raju Goundan[1]. The present decision seems to mark a departure from the earlier view and suggests that cancellation of the tree patta would place the trees at the disposal of the Government.

RAM SARUP SINGH *v.* MOHAN SINGH, I.L.R. (1939) All. 713.

One of the points that fell to be decided in this case was whether the property acquired by a widow by adverse possession would be her stridhana. Commenting on Yagnavalkya's text (II, 143) the Mithakshara has declared that property obtained by seizure would be regarded as stridhana. Apararka has also taken the same view of the text[2]. That a widow can prescribe for an absolute estate is now indisputable: see *Satgur Prasad v. Kishore Lal*[3] and *Varada Pillai* v. *Jeevarathnammal*[4]. As early as 1894, the Privy Council laid down in *Lachhan Kunwar* v. *Manorath Ram*[5] that "unless it was clearly shown that when the widow took possession she professed to do it as claiming only the limited estate of the widow," she should be held to take an absolute estate. In *Lajawanti* v. *Safa Chand*[6], however, the Privy Council declared that "if possessing as widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as stridhan, but she makes them good to her husband's estate."

The two observations were held to be not inconsistent and that it is a question of fact in each case whether the widow claimed to take through her husband and so limited her claim to a claim for a widow's estate or whether there is no evidence that she so limited her claim, in which case she will take an absolute estate, see *Dungar Singh* v. *Mt. Maid Kunwar*[7]. A mere recital that she had acquired the property as heir to the husband does not necessarily involve the legal inference that she was asserting only a limited right, particularly where there were other pieces of evidence to indicate that she had claimed absolute rights on other occasions, see *Sham Koer* v. *Dah Koer*[8] and *Uma Shankar* v. *Aisha Khatun*[9].

In the present case, on her husband's death, a widow took possession of his properties as well as of certain other properties which did not belong to him and of which he was never in posses-

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1. (1927) 53 M.L.J. 104.
2. (1911) 21 M.L.J. (Jour.) 428.
3. (1920) 38 M.L.J. 259: L.R. 46 I.A. 197: I.L.R. 42 All. 152 (P.C.).
4. (1920) 38 M.L.J. 313: L.R. 46 I.A. 285: I.L.R. 43 Mad. 244 (P.C.).
5. (1894) 5 M.L.J. 1: L.R. 22 I.A. 25: I.L.R. 22 Cal. 445 (P.C.).
6. (1924) 47 M.L.J. 935: L.R. 51 I.A. 171: I.L.R. 5 Lah. 192 (P.C.).
7. A.I.R. 1933 All. 823.
8. (1902) L.R. 29 I.A. 132: I.L.R. 29 Cal. 664 (P.C.).
9. (1923) I.L.R. 45 All. 729.

sion. The High Court took the view that the crucial factor in determining the character of these other properties was the animus of the widow at the time of taking possession and that the burden of proof will lie on the person challenging the stridhana character of the acquisition to prove the contrary. Though seemingly the decision suggests the existence of a presumption in favour of a widow's acquisition by adverse possession being regarded as stridhana, the conclusion is really one resting on the facts of the case.

RUPCHAND v. GURDIAL, I.L.R. (1939) All. 162.

This case decides an important question of procedural law involving the interpretation of the relative scope of Ss. 63 and 73 of the Civil Procedure Code. The point was whether holders of decrees of inferior courts whereof execution has been stopped by the operation of S. 63 are entitled to apply to the superior court for rateable distribution under that section read with S. 73, without getting a transfer of their decrees to the latter court for purposes of execution. In the present case the plaintiff had obtained a decree against the judgment-debtor in the Munsif's Court and attached his property in execution. Subsequently the first defendant who had obtained a decree against the judgment-debtor in the Sub-Court took out execution and had the self-same property sold by the Sub-Court. The plaintiff applied to the Sub-Court for rateable distribution, but the claim was rejected. Thereupon he filed a regular suit for the vindication of his claim to such distribution.

Three different views are gatherable fron the decided cases. According to one view, unless the holder of the decree of the inferior Court gets it transferred to the Court realising the property for purposes of execution and complies with S. 73 he cannot claim rateable distribution—see *Muttalagiri* v. *Muttayyar*[1], *Nimbaji Tulsiram* v. *Vadia Venkati*[2], *Ramjus Agarwala* v. *Guru Charan Sen*[3] and *Narasayya* v. *Obbayya*[4]. A second view was that where the attachment of the inferior Court was prior in point of time to that of the superior Court realising the property no application to the latter Court will be necessary to entitle the decree-holder, attaching earlier, to rateable distribution; otherwise a regular application under S. 73 to the latter Court will be needed, see *Krishna Kumar Ghosh* v. *Pasupati Banerjee*[5]. The third and the last view was, that S. 73 does not postulate any self-contained rule regarding rateable distribution, that that section should be read with S. 63 which forms an exception to it, and that the Court realising the assets can grant rateable distribution under the latter

1. (1883) I.L.R. 6 Mad. 357.
2. (1892) I.L.R. 16 Bom. 683.
3. (1910) 14 C.W.N. 396.
4. (1913) 25 M.L.J. 601.
5. A.I.R. 1921 Cal. 87.

section to the holder of the decree of the inferior Court, though that decree has not been transferred to the superior Court and no execution proceedings have been initiated there. (See *Clark* v. *Alexander*[1], *Arimuthu* v. *Vyapuri*[2], *Narasimhacharigr* v. *Krishnamachariar*[3], *Girindra Nath Ray* v. *Kedar Nath*[4], *Kwai Tong Kee* v. *Lim Chaung Ghee*[5], *S. R. A. R. M. Firm* v. *A. L. S. P. P. L. Firm*[6], *Sarju Ram Sahu* v. *Partap Narain*[7], *Gourgopal De Sarkar* v. *Kamalkalika Datta*[8], *Thanmull* v. *Krishnaswami*[9], *Dhirendrarao Krishnarao* v. *Virbhadrappa*[10], *Iswardas* v. *Corporation of Madras*[11], *Surendra Kumar Guha* v. *Jaimini Kumar Guha*[12] and *Zumberlal Chhotelal* v. *Sitaram*[13].)

It is clear that the question concerns more a matter of procedure than of substantive right. It is equally clear that uniformity should above all be desired in the matter. Considerations of justice and convenience should therefore guide the interpretation of Ss. 63 and 73. To construe them so as to render nugatory the attachment obtained by the decree-holder in the inferior Court will certainly cause unnecessary hardship. The view favoured in *Ramjus Agarwala's case*[14] and like decisions was based partly on the fact that the words "shall determine any claim" in S. 285 of the old Civil Procedure Code, must refer to the claims referred to in Ss. 278 to 281. Those sections no longer precede S. 63 of the Code of 1908 but are now reproduced in O. 21, rr. 58 to 61. The chief basis of that view has thus disappeared. Again whereas under S. 295 of the earlier Code, application for rateable distribution had to be made to the Court which realised the assets, under the present S. 73 it is not clear that such application should be made only to the Court which held the assets. As pointed out in *Narasimhachari's case*[3], the receipt of assets by the collecting Court is really a receipt on behalf of all the Courts who have attached the same property of the judgment-debtor and hence the attaching decree-holders in each of the Courts should be held entitled to rateable distribution in the assets in the actual custody of the collecting Court. It is to be noted that at any rate all the later decisions of all the High Courts have recognised the soundness of this view and the present decision of the Allahabad High Court adopts the same conclusion.

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1. (1894) I.L.R. 21 Cal. 200.
2. (1912) 21 M.L.J. 505: I.L.R. 35 Mad. 588.
3. (1914) 26 M.L.J. 406.
4. A.I.R. 1925 Cal. 966.
5. (1928) I.L.R. 6 Rang. 131.
6. A.I.R. 1931 Rang. 111.
7. (1933) I.L.R. 55 All. 622.
8. (1934) I.L.R. 61 Cal. 240.
9. A.I.R. 1935 Mad. 988.
10. (1935) I.L.R. 59 Bom. 310.
11. (1936) 71 M.L.J. 328: I.L.R. 59 Mad. 1028.
12. I.L.R. (1937) 1 Cal. 391.
13. I.L.R. (1937) Nag. 219.
14. (1910) 14 C.W.N. 396.

FIRM LADURAM SAGARMAL *v.* JAMUNA PRASAD CHAUDHURI, I.L.R. (1939) Pat. 114.

The Indian Partnership Act does not in terms make the registration of firms compulsory. Still the effect of the prohibitions specified in S. 69 will practically necessitate the registration of a firm at some time or other. S. 69 (2) lays down that no suit can be instituted by an unregistered firm against any third party to enforce a right arising from a contract. Judicial opinion is conflicting whether non-registration is fatal to the very institution of the suit or merely precludes relief being given and whether registration subsequent to institution can relate back to the filing of the plaint or at least enable the plaint to be amended and treated as presented immediately after such registration. The Calcutta High Court has favoured the construction of the section in " accordance with justice," rather than with the strict letter of it, and held that a suit filed by an unregistered firm may be deemed to have been instituted on the day following the registration, if there has been such subsequent registration, *Radha Charan Saha* v. *Matilal Saha*[1]. According to that Court the section does not deprive the Court of its jurisdiction but merely keeps it suspended pending registration. The same view has been taken in *Varadarajulu Naidu* v. *Rajamanicka Mudaliar*[2], though it is recognised that a logical construction of the section may lead to a different result. Where under O. 33, r. 15, C.P. Code, a person whose application to sue in *forma pauperis* has been refused, has been given liberty to institute a suit in the ordinary manner provided he has *first* paid the costs awarded to the Government and the opposite party in his application to sue as a pauper and he institutes such a suit without satisfying the condition but pays the costs later on it has been held that the suit need not be dismissed but may be treated as instituted on the day the condition was satisfied, *Ramakrishna Nadar* v. *Thirumalai Vandaya Thevan*[3]. By parity of reasoning, the registration of a firm subsequent to the institution of a suit by it, may be regarded as having the same effect. A strict construction of the section has however been adopted by the Allahabad and Lahore High Courts, and suits instituted by unregistered firms have been held to be altogether incompetent and incapable of being regularised by subsequent registration, *Ram Prasad* v. *Kampta Prasad*[4], *Firm Kishen Lal* v. *Abdul Ghafur Khan*[5], *Chhagan Lal* v. *Firm Mangal Sain*[6]; see also *Subramania Mudaliar* v. *East Asiatic Company*[7].

The present case follows this view in preference to that adopted in Calcutta and in the later decision of the Madras High Court. There

1. (1937) 41 C.W.N. 534.
2. (1937) 2 M.L.J. 273.
3. (1935) 69 M.L.J. 791.
4. A.I.R. 1935 All. 898.
5. (1935) I.L.R. 17 Lah. 275.
6. A.I.R. 1938 Lah. 767.
7. (1936) 71 M.L.J. 663.

is no real analogy between a plaint presented by an unregistered firm and one filed prematurely when the cause of action had not yet arisen. Registration of firms is after all designed primarily to protect third parties. There can be no frustration of this object or of any policy of the law, in any degree, by construing S. 69 (2) liberally, as enabling a suit brought before registration of the firm to be regarded as validly instituted immediately after registration, where that has been done, instead of being liable to be dismissed outright. The policy underlying O. 26, r. 4 of the Supreme Court Rules may well be followed in India as well. Again as pointed out in *Mt. Suga Kuer* v. *Firm Brijraj*[1], the Partnership Act has not been in force for any long period and it would be inappropriate to enforce the provisions too rigidly.

SITAL PRASAD SINGH *v.* AJABLAL MANDER, I.L.R. (1939) Pat. 306.

The main point for decision in this case related to the power of a manager of a joint Hindu family to mortgage ancestral property to find funds for the acquisition of new properties for the family. After deprecating any alienation of immovable property in general the Mitakshara postulates in Ch. I, S. 1, cl. 28, an exception, on the authority of a text of Brihaspati :

एकोऽपि स्थावरे कुर्याद् दानाधमनविक्रयम् ।
आपत्काले कुटुंबार्थे धर्मार्थे च विशेषतः ॥

Even one person may conclude a gift, hypothecation or sale of immovable property during a calamity or for the sake of the family or for indispensable religious duties. The exposition of the text in cl. 29 by the Mitakshara makes it clear that the three circumstances specified therein should pertain to the entire family. The Privy Council has recognised in *Benares Bank* v. *Hari Narayan*[2], that this exposition defines the power of a joint family manager to alienate family property, and that the judgment of the Board in *Hanuman Prasad's case*[3] was apparently founded on that authority. Need or benefit of the estate will alone justify an alienation. These expressions correspond evidently to आपत्काले and कुटुम्बार्थे in Brihaspati's text. It is clear that the two phrases refer to two different situations. Nevertheless there are to be found dicta of the Privy Council, which suggest that alienation of joint family property will be justified only if there is a compelling necessity, see *Brij Narain* v. *Mangal Prasad*[4] and *Benares Bank* v. *Hari Narayan*[2]. That such an inference will not be valid is clear from observations of the Privy Council in other cases. *Hanuman Prasad's case*[3] itself speaks of "need" *or* "benefit of the estate" as justifying an alienation and draws a distinction between "a danger

1. A.I.R. 1937 Pat. 526.
2. (1932) I.L.R. 54 All. 564 (P.C.).
3. (1856) 6 Moo. I.A. 393.
4. (1923) I.L.R. 46 All. 95 (101) (P.C.).

to be averted from the estate" and "the benefit to be conferred upon it"; see also *Sadhu Ram* v. *Bhup Singh*[1] and *Sri Thakur Ramakrishna* v. *Ratan Chand*[2].

The meaning of the phrase "benefit of the estate" has been considered by the Privy Council in *Palaniappa* v. *Devasikamani*[3]. While recognising that a precise definition of it would be impossible, Lord Atkinson held that the preservation of the estate from extinction, the protection of it from deterioration and such *like* things would obviously be benefits. This lent colour to the view that that expression must be understood to refer to acts of a purely protective or defensive character, *Ragho* v. *Zaga*[4] and *Ramkaran Thakur* v. *Baldeo Thakur*[5]. It was in that view that a sale or mortgage of family property for the purchase of other properties for the family was considered in some cases to be bad, see In re *Krishnaswami*[6], *Subramania* v. *Chidambara*[7], *Tula Ram* v. *Tulsi Ram*[8], *Inspector Singh* v. *Kharak Singh*[9], etc. There is not much warrant for so restricting the scope of the expression "benefit of the estate." The Sanskrit equivalent कुटुम्बार्थे refers to family purpose in general and not to the protection of the family only. Even as early as *Hanuman Prasad's case*, the propriety of an alienation by a limited owner was judged by the test whether the transaction was one into which a prudent owner would enter in the ordinary course of business, with the knowledge available to him at that time; see also *Jagat Narain* v. *Mathura Prasad*[10], *Amrej Singh* v. *Shambu Singh*[11] and *Ram Nath* v. *Chiranji Lal*[12]. Applying this test and regarding it as a question of fact depending upon the circumstances of each case, it has been held in a series of decisions that an alienation of joint family property for buying other properties for the family may be permissible as an act beneficial to the family, see *Muthuswami* v. *Sundara Velan*[13], *Mahalakshmamma* v. *Ramaswami*[14], *Amrej Singh* v. *Shambu Singh*,[15] *Ram Bilas Singh* v. *Ramyad Singh*[16], *Sheikh Jan Mohammad* v. *Bikoo Mahto*[17], *Baijnath Prasad* v. *Binda Prasad*[18], etc. The decision under review takes the same view and holds that it is for the Court to consider on the facts whether the impugned transaction is for the benefit of the family, in the larger sense of that expression.

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1. (1919) I L R 39 All. 437 (P.C.).
2. (1931) I L R. 53 All. 190 (P.C.)
3. (1919) 33 M.L.J. 1: L.R. 44 I.A. 147: I.L.R. 40 Mad. 709, 718. (P.C.).
4. (1929) I.L.R. 53 Bom. 419.
5. (1938) I.L.R. 17 Pat. 168.
6. (1912) M.W.N. 167.
7. 41 M.L.J. 459.
8. (1920) I.L.R. 42 All. 559.
9. (1928) I.L.R. 50 All. 776.
10. (1928) I L R 50 All. 969 (F.B.)
11. (1933) I L R. 55 All. 1 (F.B.).
12. (1935) I.L.R. 57 All. 605.
13. (1927) 53 M L.J. 218: A.I.R. 1927 Mad. 649.
14. (1926) 50 M.L.J. 651.
15. (1933) I.L.R. 55 All. 1 (F.B.)
16. (1920) 5 Pat.L.J. 622.
17. (1928) I.L.R. 7 Pat. 798.
18. (1938) I.L.R. 17 Pat. 549.

BRIJ BEHARI LAL *v.* FIRM SRINIVAS RAM KUMAR, I.L.R. (1939) Pat. 327 (F.B.); UPENDRA NATH BASU *v.* PANDAYA GULAB SARKAR, I.L.R. (1940) Pat. 531 (F.B.).

The proviso to O. 21, r. 90, C. P. Code, framed by the Patna High Court lays down that no application under that rule shall be admitted unless the applicant deposits along with his application such an amount not exceeding 12½ per cent. of the proceeds of the sale or such other security as the Court may fix unless the Court dispenses with the deposit altogether. Two questions arose for decision on this proviso, namely, (1) whether the deposit should have been made at the time of the presentation itself of the application or may be made at any time before its admission, and (2) whether the proviso is *intra vires* the rule-making powers of the Patna High Court. On the first question, the first Full Bench held that the deposit may be made at any time before the admission of the application, a view which was accepted by the second Full Bench also. As regards the second question, the earlier Full Bench left the matter open but the later Full Bench decided that the proviso is perfectly valid.

It is difficult to agree with the construction of the proviso adopted by the Full Bench. Their Lordships have argued that the proviso draws a distinction between the *presentation* of an application and its *admission*, and that it prohibits the Court only from admitting an application before the deposit is made, but does not bar the *filing* of the application itself. In other words while the application will have to be filed within 30 days of the sale as prescribed by the Limitation Act, the deposit may be made later. Reliance is also placed for such a construction by a reference to the difference in language employed in S. 17 (1) of the Provincial Small Cause Courts Act which provides that an applicant for an order to set aside an *ex parte* decree or for a review of judgment shall at the time of its *presentation* be accompanied by a deposit in Court of the amount decreed unless the Court on a *previous application* had directed him to give security. Under this section it has been held that the deposit should be made in any event before the expiry of the period of limitation prescribed for the application, *Ahmed Haji Ibrahim* v. *Abdul Hussain*[1] and *Qabul Singh* v. *Jai Prakash*[2]. The absence of the term 'presentation' in the proviso to O. 21, r. 90 can hardly make any difference. The proviso is wholly clear that the deposit should be made "along with the application." The words "along with" can never mean "later on" or "subsequently." It cannot in any event contemplate a period beyond that prescribed for the application itself. If deposit is to be dispensed with, it should have been ordered on an earlier

1. (1932) I.L.R. 55 Bom. 779. 2. I.L.R. (1939) All. 554.

application for that purpose. The view of the Full Bench ignores altogether the requirement in the proviso that the deposit should be made *along with the application.*

As to the validity of the amendment to O. 21, r. 90, it depends mainly on the actual language of the amendment and its effect. The rule-making power of the High Court flows from S. 122 and is conditioned by S. 128, C.P. Code. The rules framed can annul, alter or add to the rules in the First Schedule. The only limitations are that they should not clash with the body of the Code or with any other enactment in force. The question thus will be whether the proviso to O. 21, r. 90 framed by the Patna High Court cuts at any substantive right or merely deals with a matter of procedure. "Procedure" merely " denotes the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines that right." (*Poyser* v. *Minors*[1].) It is doubtful if a litigant has, apart from the provisions of the statute under which a sale is held, any common law right to avoid the sale —see however In re *O. N. R. M. M. Chettyar Firm* v. *The Central Bank of India*[2]. Even if the right to have the sale set aside is a common law right, it must be deemed to have been merged in and replaced by the statutory right conferred by O. 21, r. 90. In any event the validity of the proviso to that rule will depend upon the question, whether it imposes an indispensable preliminary before any proceedings take place at all or whether it merely seeks to put the applicant upon terms as part of the procedure in the hearing of the application. In Rangoon, the amendment to the rule laid down that no application to set aside a sale shall be admitted unless the applicant deposits with his application the amount mentioned in the sale warrant or an amount equal to that realised by the sale whichever is less. The deposit was a condition precedent. Nothing was left to the discretion of the Court in that matter. The amendment stifled altogether the right of being heard to impeach the sale and hence was rightly held to be *ultra vires*. Where the effect of the amendment is however merely to put the applicant upon terms, stringent though they might be, as part of the procedure in hearing the application, no objection can be taken to its validity. Thus on a construction of the rules framed under S. 9 of the Presidency Small Cause Courts Act requiring an applicant for a new trial either to deposit the decree amount or furnish security therefor as a condition precedent to such application, it was held that the rule failed as being repugnant to S. 38, though it would be competent to the Small Cause Court to impose such a condition when a retrial was

1. L.R 7 Q.B.D. 329 at 333.
2. (1937) Rang.L.R. 268 (F.B.)

actually ordered, *Madurai Pillai* v. *Muthu Chetty*[1]. Where a power to make regulations is given by a statute the general rule is that no regulation thereunder can abridge a right conferred by the statute itself.[1] To make an absolute rule which has the effect of debarring a man from the exercise of an absolute statutory right unless he complies with a number of requirements, is clearly *ultra vires*, per Kennedy, J. in *Queen* v. *Bird*[2]. Where on an appeal preferred under cl. 15 of the Letters Patent of the Calcutta High Court, against the rejection by that Court in its original jurisdiction of an application under the Probate and Administration Act of 1881, the High Court applied O. 41, r. 10, C. P. Code and asked the appellant to furnish security for costs, it was held by the Privy Council that such an order neither limits nor takes away the right of appeal under the Letters Patent but is only a rule of procedure applicable to Letters Patent Appeals also, *Sabitri* v. *Savi*[3]. The test therefore of the validity of any amendment to O. 21, r. 90 effected under the rule-making power will depend on the nature of the amendment and its effect. In Madras, the proviso framed states that the Court may before admitting an application under O. 21, r. 90 call upon the applicant to furnish security for the amount mentioned in the sale warrant or that realised by the sale whichever is less, or to deposit such amount into Court. There is no bar whatever to the presentation of the application, and whether a deposit is to be required or security should be called for is a matter left entirely to the discretion of the Court. There was thus no violation of any substantive right and the amendment was held to be *intra vires*[4]. The language of the proviso framed by the Patna High Court however requires the deposit to be made along with the application under O. 21, r. 90, unless it had been dispensed with. But for the rather curious construction of the proviso adopted by that High Court, namely, that the deposit may be made at any time before admission of the application the validity of the proviso would have been extremely doubtful.

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1. (1914) 26 M.L.J. 227: I.L.R. 38 Mad. 823.
2. (1898) 2 Q.B.D. 340.
3. (1921) 40 M.L.J. 308: L.R. 48 I.A. 76; I.L.R. 48 Cal. 481 (P.C.)
4. (1938) 2 M.L.J. (N.R.C.) 34.

SUSHIL KUMAR GHATIK *v.* SATYA GOPAL CHATTERJI, I.L.R. (1940) 1 Cal. 153.

In this case, the learned Judges have held that a purchaser under a private sale from a judgment-debtor after the sale of an agricultural holding under Chapter XIV of the Bengal Tenancy Act and before its confirmation is a person whose interests are affected by the sale within the meaning of S. 174 (1) of the Act and is entitled to get the sale set aside under that section. The provisions of S. 174 (1) entitle "any person whose interests are affected by the sale" to apply to set aside the sale under the Bengal Tenancy Act. In this respect, the terms of the section bear a close resemblance to those of O. 21, r. 90 of the Civil Procedure Code, which also entitles "any person whose interests are affected by the sale to apply for setting aside the sale". Under this rule, it has been held by a single Judge of the Calcutta High Court in *Kiran Bala* v. *Suniti Prova*[1], that a purchaser from a judgment-debtor after the Court sale is not entitled to apply for setting aside the sale, under O. 21, r. 90 of the Civil Procedure Code. In this latter case, the learned Judge has held that the applicant should have had a subsisting interest on the date of the execution sale and that as the subsequent purchaser had no such interest, he could not apply.

The learned Judges in the case under notice have pointed out that there is nothing in S. 174 (1) of the Bengal Tenancy Act to indicate that the interest of the person making the application for setting aside the sale must be in existence on the date of the sale. These observations apply with equal force to the provisions of O. 21, r. 90 of the Civil Procedure Code. If the legislature had intended to restrict the right to persons who had an interest on the date of the sale, it could well have used the language similar to O. 21, r. 89 of the present Code of Civil Procedure.

There is a conflict of opinion on the question whether an execution purchaser would come within those words of O. 21, r. 90. The Calcutta High Court, the Lahore High Court and the Rangoon High Court have held that if his interest is not anterior to the sale, he could not apply to set aside the sale under O. 21, r. 90 of the Civil Procedure Code. (See *Surendra Nath Das* v. *Alauddin Mistry*[2], *K. V. A. L. Chettiar Firm* v. *M. P. Maricar*[3] and *Nihal Chand Gopal Das* v. *Pritam Singh*[4].) On the other hand, the Madras High Court, the Allahabad High Court and the

1. I.L.R (1939) 1 Cal. 273.
2. (1928) 49 C.L.J. 207: A.I.R. 1928 Cal 828.
3. (1928) I.L.R. 6 Rang. 621: A.I.R. 1929 Rang. 33.
4. (1932) I.L.R. 14 Lah. 1: A.I.R. 1932 Lah. 468.

latest decision of the Patna High Court have held that the auction purchaser is entitled to apply for setting aside the sale under O. 21, r. 90. (See *Gopala Krishnayya* v. *Sanjeevareddi*[1], *Ravinandan* v. *Jagarnath*[2] and *Mahadeo Ram* v. *Raja Mohan Vikram Sah*[3], overruling *Khetro Mohan Datta* v. *Sheikh Dilwar*[4].) We venture to submit that on the plain language of O. 21, r. 90 of the Civil Procedure Code, as contradistinguished from that of O. 21, r. 89, the view of the Madras, Allahabad and Patna decisions seems to be well founded. The decision under notice also lends colour to the same view.

The learned Judges in the present case however seem to distinguish the case of rent sales under the Bengal Tenancy Act from those of sales under the Civil Procedure Code by reason of the fact that the title of the purchaser under a rent sale only commences from the date of confirmation while in the case of an execution sale under the Civil Procedure Code, on confirmation of the sale, the title of the purchaser relates back to the date of the sale. We are not however sure that this distinction has any bearing on the question of the construction of O. 21, r. 90 of the Civil Procedure Code, or of S. 174 (1) of the Bengal Tenancy Act. On the date of the application to set aside the sale and before the date of its confirmation, even under the Civil Procedure Code, the title remains with the judgment-debtor and he cannot be ousted from possession by the auction purchaser. (See *Mukhi Narumal Tilokchand* v. *Allabhux Bahadur*[5] and *Ghirdhari Lal* v. *Mohd. Ishrat Ali*[6].) Reference may be made by way of analogy to S. 28 of the Provincial Insolvency Act under which though the title relates back on the adjudication to the date of the petition in insolvency, until adjudication the title to the property remains with the debtor. *See* Mulla's Law of Insolvency, page 414.

It may be noticed that under the Code of Civil Procedure of 1882, it was held by the Madras High Court under S. 310-A that a purchaser from the judgment-debtor after the execution sale could deposit the amount into Court and have the execution sale set aside, *Appayya Shetti* v. *Kunhati Beari*[7] and *Manicka Odayan* v. *Rajagopala Pillai*[8], though the contrary view had been taken in *Hasari Ram* v. *Badai Ram and Nanda Lal*[9]. The Code has since been amended. We, however, refer to these cases to show that

1. (1919) 38 M.L.J. 228: 55 I.C. 333.
2. (1925) I.L.R. 47 All. 479.
3. (1933) I.L.R. 12 Pat. 665.
4. (1918) 3 P.L.J. 516.
5. A I R. 1933 Sind 198 at 200.
6. (1937) O.W.N. 1153 at 1156.
7. (1906) 17 M.L.J. 127 : I.L.R. 30 Mad 214.
8. (1907) 17 M.L.J. 291. I.L.R. 30 Mad. 507.
9. (1897) 1 C.W.N. 279.

even after execution sale the judgment-debtor has a saleable interest in the property and it will be affected by the sale being confirmed, Cf. *Sundaram* v. *Mausa Mavuthar*[1]. This view supports the construction placed on S. 174 (1) of the Bengal Tenancy Act that the sole criterion for determining whether a person's interest is affected by the sale is to find out whether his interest will be affected if the sale be ultimately confirmed. We venture to submit that is the correct test to be applied and judged by this test the decision in *Kiran Bala Saha* v. *Suniti Prova Saha*[2], under O. 21, r. 90 of the Code of Civil Procedure, may require reconsideration.

GOKHUL MAHTON *v.* SHEO PRASAD LAL SETH, I.L.R. (1939) Pat. 459 (F.B.).

The proper article of the Limitation Act applicable to a suit for recovery of unpaid instalments due under an ordinary money instalment bond with a defeasance clause and the starting point of limitation in such a case were the main points decided in this case. It was held that Art. 75 would apply and that time will begin to run from the date of the first default where there was no waiver of it, and from the date of the fresh default where there was a waiver. Some of the earlier decisions had, on the analogy of mortgage bonds payable by instalments and containing defeasance clauses, taken the view that the plaintiff was entitled either to bring his action when any instalment became due or to wait until the whole became payable —*Rup Narain Bhattacharya* v. *Gopi Nath Mandol*[3], *Ramchandra Nayak* v. *Gharbaran Ahir*[4], etc. This view overlooked the difference in the language contained in the third column of Arts. 75 and 132 respectively. Under Art. 132, limitation starts from the time *when the money sued for became due*, whereas under Art. 75 time begins to run from the date *when the default is made*. A mortgage is for a term certain, which may be as much for the benefit of the mortgagee as of the mortgagor, though the default clause is exclusively for the benefit of the mortgagee. Thus the mortgagee may either sue on default or wait. Limitation will start only from the date when the period stipulated under the mortgage document expired, although a default by the mortgagor had occurred during that period and by the terms of the mortgage, the mortgagee thereupon had an immediate right to enforce the mortgage, *Lasa Din* v. *Gulab Kunwar*[5],

1. (1921) 40 M.L.J. 497 : I.L.R. 44 Mad. 554 (F.B.).
2. I.L.R. (1939) 1 Cal. 273.
3. (1907) 11 C.W.N. 903.
4. (1930) 132 I.C. 112.
5. (1932) 63 M.L.J. 187 : L.R. 59 I.A. 376 : I.L.R. 7 Luck. 442 (P.C.).

Panchain v. *Ansar Husain*[1] and *Narna* v. *Ammani Amma*[2]. But Art. 75 is in very special terms and on the happening of the default the cause of action arises. In the case of ordinary instalment bonds with a defeasance clause, as pointed out by Lord Denman in *Reeves* v. *Butcher*[3], if the plaintiff " chose to wait till all the instalments fell due, no doubt he might do so ; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time that the plaintiff had a right to maintain it. The Statute of Limitation runs from the time the plaintiff might have brought his action."

Nor is it that Art. 74 which applies to instalment bonds generally will govern where the creditor did not choose to sue on the default clause for the entire amount. To so hold will be to render Art. 75 nugatory and redundant. Art. 74 can apply only where there is no default clause, and where there is one it is Art. 75 that will operate. After *Lasa Din's case*[4] the Allahabad High Court has consistently held that in the case of a simple money bond payable by instalments with a default clause, Art. 75 applies and time runs from the date of the first default, *Jawahar Lal* v. *Mathura Prasad*[5] and *Sukh Lal* v *Bhoora*[6]. The present decision takes the same view of the question.

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1. (1926) L.R. 53 I.A. 187: I.L.R. 48 All. 457 (P.C.).
2. (1916) 31 M.L.J. 865: I.L.R. 39 Mad. 981.
3. (1891) 2 Q.B. 509.
4. (1932) 63 M.L.J. 187: L.R. 59 I.A. 376: I.L.R. 7 Luck. 442 (P.C.).
5. (1934) I.L.R. 57 All. 108 (F.B.).
6. (1934) I.L.R. 57 All. 561.

PAVAYI *v.* PALANIVELA GOUNDAN, (1940) 1 M.L.J. 766 (F.B.).

The question in this case was whether a mortgagor who has lost all interest in the mortgaged property and the personal covenant against whom has become barred, can by an acknowledgment within the meaning of S. 19 or by part payment within the meaning of S. 20 of the Indian Limitation Act bind the person on whom his interest has devolved. Four different views have been expressed as to the effect generally of an acknowledgment by a mortgagor on assignees from him of the mortgaged property. One view is that the acknowledgment cannot at all bind any prior assignee, per Mookerjee, J., *Surjiram Marwari* v. *Barhamdeo Prasad*[1]; *Yagnanarayana* v. *Venkatakrishna*[2]; see also *Baldeo Prasad* v. *The Collector of Philibhit*[3], *Rajeshwari* v. *Binoda*[4] etc. According to the second view the acknowledgment will bind the prior assignees from the mortgagor only if at the time of making it he had retained a substantial interest in the mortgaged properties, *Krishnachandra Saha* v. *Bhairab Chandra Saha*[5], *Lakshmanan Chetty* v. *Muthaya Chetty*[6], per Krishnan Pandalai, J., in *Muthu Chettyar* v. *Muthuswami Iyengar*[7]. A third view is that the acknowledgment will bind all the assignees, prior as well as subsequent—per Jackson, J., in *Muthu Chettyar* v. *Muthuswami Iyengar*[7]; *Narayana* v. *Venkataramana*[8]. According to the fourth view it is the character of the acknowledgment and not the time when it is made that affects the result. The test will be whether the acknowledgment was lawful *i.e.*, not a merely friendly or collusive act between the mortgagor and the mortgagee, *Arabindakeb* v. *Jageshar Rai*[9]. It is submitted that the first of these views alone is warranted by the language of S. 19. The statute of Limitation is not a statute of repose. Equitable considerations are out of place in its construction and the strict grammatical meaning of the words is the only safe guide, *Nagendranath De* v. *Suresh Chandra De*[10]. S. 19 expressly states that acknowledgment, where it is not by the party sought to be charged in the suit, furnishes a fresh start only if it had been made by "some person through whom he derives title or liability." The user of the present tense indicates that the title contemplated as being bound is one assigned by the mortgagor subsequent to the acknowledgment. A similar construction has been adopted regarding the expression "parties under whom they or any of them claim" in S. 11 of the C. P. Code, *i.e.*, that to make a person privy to an action he must have acquired an interest either by inheritance, succession, or purchase from a party *subsequent* to the action. If this be right, then

1. (1905) 1 C.L.J. 337.
2. A.I.R. 1925 Mad. 1108.
3. (1914) I.L.R. 37 All. 113.
4. (1916) 44 I.C. 533.
5. (1905) I.L.R. 32 Cal. 1077.
6. (1919) 40 M.L.J. 126.
7. (1932) 63 M.L.J. 111=I.L.R. 55 Mad. 758.
8. A.I.R. 1935 Mad. 899.
9. (1919) 17 A.L.J. 763.
10. (1932) 63 M.L.J. 329=I.L.R. 60 Cal. 1=L.R. 59 I.A. 283 (P.C.).

it is wholly immaterial whether the mortgagor has at the time of making the acknowledgment any substantial interest in the mortgaged property or not. Further acknowledgment being a statement against one's interest can affect only such interest as one has at that time and cannot fasten on an interest that had already been conveyed. The decision under review has adopted this conclusion and this is in consonance with the view indicated in *Bolding* v. *Lane*[1] and *Newbould* v. *Smith*[2].

As regards the effect of part payment of interest or principal, different provisions existed in English law according as the debt was one charged upon the land or a specialty debt merely. The statute 3 and 4, Wm. IV, C. 27, Ss. 40 and 42 governed the former as regards recovery of the sum secured or the interest thereon respectively. In regard to bond debts S. 5 of 3 & 4 Wm. IV., C. 42 operated. Though these statutes had postulated that acknowledgment would save limitation only if made by the person 'by whom the amount was payable' in the one case and by 'the party liable on the indenture' in the other case, so far as part payment was concerned they did not specify by whom it should be made. It was however held that the payment relied on should have been made by "a party interested" or "concerned to answer the debt" and not by a "stranger," *Roddam* v. *Morley*[3], *Chinnery* v. *Evans*[4], *Lewis* v. *Wilson*[5], *In re Lacey*[6]. S. 20 of the Indian Limitation Act has embodied practically the same rule. Under it the part payment of interest as such or of the principal should be by "the person liable to pay the debt" or "the debtor" respectively or by the agent of such person duly authorised in that behalf. The effect of payment by a proper person is in English law to keep alive the right of action in all its original integrity and force and set the action free against all the persons interested, a consequence resting on the joint liability of a number of persons standing in equal peril of suit and who all benefit by the discharge of all or any part of such liability, *In re Lacey*[6]. There is however a cleavage of opinion as to the effect of payment by a mortgagor on the prior assignees from him of mortgaged items. At one end it has been held that a mortgagor who has parted with the equity of redemption completely is not 'a person interested' and a payment by him would not prevent limitation running against the assignees of the equity of redemption *Newbould* v. *Smith*[2]. At the other end the suggestion seems to be that even if the properties sought to be bound are with assignees, so long as the personal liability remains, a payment by the mortgagor would bind the prior assignees from him,—see *Velayudha* v. *Vaithialinga*.[7] In between these two views there is another line of thought, that at

1. (1863) 1 De. G. J. & S. 122=46 E.R. 47.
2. (1886) 33 Ch. D. 127.
3. (1857) 1 De.G.& J. 1=44 E.R. 622.
4. (1864) 11 H.L.C. 115.
5. (1886) 11 A.C. 639.
6. (1907) 1 Ch. 330.
7. (1912) 24 M.L.J. 66.

any rate if the mortgagor making the payment has at that time some interest in the mortgaged properties, prior assignees from him would be bound by such payment. *Chinnery* v. *Evans*[1-2], *Krishna Chandra* v. *Bhairab Chandra*[3], *Domi Lal Sahu* v. *Roshan*[4]. The correctness of the rule laid down by the Court of Appeal in *Newbould* v. *Smith* seems to have been questioned in England itself, though the House of Lords has left the matter open[5]. Even where the mortgagor has parted with the equity of redemption in its entirety, still he will not cease to be a 'debtor' within the meaning of S. 20 so long as the personal remedy against him is not barred, and as such he will be competent by his payment to afford a fresh starting point of limitation. In the decision under review the learned Chief Justice has stated: "In certain of the cases........the mortgagor retained an interest in part of the mortgaged properties sold, but I do not consider that this makes any difference in principle.... If he cannot bind the purchaser of the equity of redemption, when the purchase covers the whole of the mortgaged properties obviously he cannot bind the purchaser of part of the mortgaged properties." This is an *obiter dictum* but the position so stated does not seem to allow for the rather wide language in S. 20 which on the principles of the English rulings like *Roddam* v. *Morley*[6], enable any person 'interested' in the property or 'concerned to answer the debt' to give a fresh start, setting free thereby the action against all persons interested in the property. The reason is that the integrity of the mortgagee's right cannot in any wise be affected by any subsequent dealing of the mortgagor with the equity of redemption, see *Chinnery* v. *Evans*[1-2]. The decision in *Bolding* v. *Lane*[7] on which reliance was placed was one concerning the effect of an acknowledgment by a mortgagor under 3 & 4, Wm. IV, C. 27, S. 42 on the puisne mortgagee's liability regarding arrears of interest due to a prior mortgagee and cannot govern a case of part payment under S. 20 of the Indian Act, resting on entirely different considerations, particularly in view of the later ruling of the House of Lords in *Chinnery* v. *Evans*[1-2] as to the effect of a part payment by a mortgagor on prior assignees from him of the equity of redemption of some of the mortgaged items.

RAMACHANDRA RAO *v.* PARASURAMAYYA, I.L.R. (1940) Mad. 349=(1940) 1 M.L.J. 235 (F.B.).

This Full Bench decision holds that the bar of execution of decree after the lapse of twelve years from the date of the decree sought to be executed, prescribed in S. 48, C. P. Code is absolute and that any

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1-2. (1864) 11 H.L.C. 115.
3. (1905) I.L.R. 32 Cal. 1077.
4. (1906) I.L.R. 33 Cal. 1278.
5. (1889) 14 A.C. 423, 426, 428.
6. (1857) 1 De. G. & H. 1=44 E.R. 622.
7. (1863) 1 De. G. & J. & S. 122=46 E.R. 47.

amendment of the decree will not have the effect of affording a fresh start for purposes of limitation. Different views have been held on this question as is apparent from the decisions. One view is that the expression ' decree sought to be executed ' in S. 48 is wide enough to include the amended decree so as to make the date of the amendment a fresh starting point of computation of the twelve year period see *Baldeo Shukul* v. *Syed Yusuf*[1]. Another view is that where the original decree was incapable of execution and amendment of it was therefore necessary it is the date of the amended decree that would furnish the starting point, *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan*[2], *Narhar Raghunath* v. *Krishnaji Govind*[3], *Venkatamma* v. *Manikyam Nayani*[4]. Yet another view is that no execution at all is permissible after twelve years from the date of the original decree and it is entirely irrelevant whether the decree was amended or not subsequently, see *Pydel* v. *Chathappa*[5], *Parameshrayya* v. *Seshagiriappa*[6], *Narasing Rao* v. *Bando Krishna*[7], *Faqir Chand* v. *Kundan Singh*[8], *Ganesh Das* v *Kishan Das*[9], *Mst Dulhin* v. *Mahanath Harihar Gir*[10]. The last of these constructions seems to represent the position correctly. Art. 179 of Sch. II of the Limitation Act of 1877 prescribed three years from the date of the decree for purposes of execution and there was no provision for the period to run from the date of the amended decree. Art. 182 of the Limitation Act of 1908 however made provision for the same, but prescribed that the article shall apply only "for the execution of a decree or order of any Civil Court not provided for by Art. 183 or S. 48, C. P. Code 1908." This can only mean that where execution stands controlled by S. 48, C.P. Code, Art. 182 of the Limitation Act will afford no help. S. 48 of the C.P. Code in this matter has been left unamended all along, suggesting that it has been so left advisedly. The twelve year period thereunder is directed to be computed from the date of the decree sought to be executed. Under O. 20, r. 7 the decree is to bear the date of the judgment. So even if there is any amendment of the decree to make it conform to the judgment, the date of the decree will still be the date of the judgment only. Again an amendment is in no sense a novation. It merely expresses the real intention which the decree was intended to express but which it did not completely express. It does not vary the transaction in substance but merely rectifies the inaccurate description. Hence the amended decree should be deemed to be in force from the date of the original decree and limitation will start running from that date alone. The decision under review takes the same view and definitely brings the law in Madras in line with that prevailing in the other provinces.

1. (1921) 60 I.C. 318.
2. (1894) I.L.R. 17 All. 39.
3. (1912) I.L.R. 36 Bom. 368.
4. (1914) 26 I.C. 244.
5. (1890) I.L.R. 14 Mad. 140.
6. (1899) I.L.R. 23 Mad. 364.
7. (1918) I.L.R. 42 Bom. 309.
8. (1932) I.L.R. 54 All. 622.
9. A.I.R. 1935 Lah. 292.
10. (1939) I.L.R. 18 Pat. 395.

VENKATA GOPALA NARASIMHA RAO *v.* VENKATARAMAYYA, (1940) 2 M.L.J. 257 (F.B.).

The question that fell to be decided in this case was whether an income-tax return and the statements accompanying it are public documents of which certified copies would be admissible in evidence. The Evidence Act allows secondary evidence to be given of public documents (S. 65); certified copies would constitute such evidence, (S. 77), and such copies can be obtained according to S. 76 by persons having a right to inspect the originals. Documents forming the acts or records of the acts of public officers would be public documents under S. 74. It was held in some cases that the term 'act' in the context means an act of the nature indicated in S. 78, *i.e.*, a final completed act as distinguished from an act of a preparatory or tentative character and that it is only a document recording such a completed act that would be a public document, per Shepherd, J., in *Empress* v. *Arumugham*[1]; *Chandi Churn* v. *Boistab Churn*[2]. Agreeably to such a construction it was held in a number of cases that an income-tax return was not a public document, *Anwar Ali* v. *Tafozal Ahmed*[3], *Devidatt* v. *Shriram*[4], *Venkataramana* v. *Varahalu*[5], *Varadarajan Chetty* v. *Kanakaiah*[6]. In *Mythili* v. *Janaki*[7], it was held that it is only the notice of demand under S. 29 of the Income-tax Act, in which the Income-tax Officer communicates his decision to the assessee and not any earlier statement made or return submitted by the assessee to such officer that can be regarded as the record of the acts of the officer. Though in that case the contention that the return which forms the basis of the assessment should be deemed to be a part of the act of the Income-tax Officer or part of the record of such act was repelled as "absurd" on the very face of it, it has however been accepted by the Full Bench in the instant decision. The learned Chief Justice has stated how "it would be putting an unwarranted restriction on the words 'documents forming the acts or record of the acts' to say that they should be confined to those parts of an income tax record which the Income-tax Officer has himself prepared and to exclude documents which he has himself called for or which have been admitted to the record for purposes of the assessment."

In effect, the decision under notice constitutes a repudiation of the strict interpretation of S. 74 favoured by Shepherd J., in *Empress* v. *Arumugham*[1], The adoption of a liberal construction is supported by the English Practice also. Under the English Public Record Office Act, 1838, depositions, affidavits, bills, answers etc., filed in

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1. (1896) 7 M.L.J. 167=I.L.R. 20 Mad. 189 (F.B.).
2. (1903) I.L.R. 31 Cal. 284.
3. (1924) I.L.R. 2 Rang. 391.
4. (1931) I.L.R. 56 Bom. 324.
5. (1938) 50 L.W. 681.
6. (1939) 1 M.L.J 791.
7. I.L.R. 1940 Mad. 329.

Court, though not records in the strict sense of the term are yet deemed to partake so much of their nature that they are allowed to be proved by means of copies to the same extent as records proper[1]. O. 37, r. 4, of the Supreme Court Rules renders office copies of writs and pleadings admissible in evidence in all causes and matters and between all persons and parties to the same extent as the original would be admissible[2]. In India also it has been held that a petition which was the subject matter of an order passed would be a part of the record, *Bhagain Megh Ranee Koer* v. *Gooroo Pershad*[3], likewise the plaint filed in a suit, *Shazada Mahomed Shahaboodeen* v. *Wedgeberry*[4], *contra Tarakeshwar* v. *Devendra*[5]. By parity of reasoning the return made to the Income-tax Officer on which he passes the assessment order would be part of the record of the acts of that officer.

Paragraph 85 of the Instructions compiled by the Income-tax Department for the guidance of its officers provides for inspection being allowed to a party making the return as well as to any partner of the firm to which the return relates. Rule 99 of the Income-tax Rules provides for the grant of certified copies. It is thus open to a party making the return or to any partner where the return relates to a firm to obtain lawfully a certified copy thereof. The copy being one given to a person entitled to inspect and of a public document it would be admissible as secondary evidence in the absence of any statutory prohibition of its reception. Does S. 54 of the Income-tax Act constitute such a bar? Sub-section 1 of that section declares the particulars contained in the return to be confidential and provides that no Court shall require except in the specified cases any public servant to produce such a document. Sub-section 2 penalises the disclosure of such particulars. The purpose of the section is no doubt to afford protection to the assessees from any possible user against them of the information imparted in the Income-tax returns by third persons[1]. The section does not however render inadmissible in evidence the certified copies of such returns; nor is any policy of the law defeated where the very person who made the return proposes to prove its contents or where one partner of a firm uses it against the other partners. Any argument depending merely on the possible intention of the legislature as rendering the document inadmissible apart from the actual language of S. 54 will be no sufficient ground for shutting out such evidence.

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1. Taylor on Evidence, S 1534.
2. See also R. v. Scott, (1877) 2 Q.B D. 415.
3. (1876) 25 W.R. 68.
4. (1873) 10 Ben.L.R. App. 31.
5. A.I.R. 1926 Pat. 180.

AMBU BAI AMMAL *v.* SONI BAI AMMAL, (1940) 2 M.L.J. 298 (F.B.).

In this case it has been held that a sonless destitute widowed daughter is entitled to maintenance out of her father's estate in the hands of his heirs. It is rather curious that there should be a paucity of direct textual authority in regard to this question. Manu has declared the maintenance of an infant child (शिशुः सुतः) to be a personal obligation of the father. This is in conformity with the Law of Nature as well as that of civilized communities. Infancy in the case of a daughter has been practically equated with the period prior to marriage. For on marriage the obligation is shoved on to the husband whose duty it becomes to maintain his chaste wife (साध्वी भार्या) thereafter. Does that mean that the parental obligation is extinguished or merely remains suspended so long as the husband and his family can maintain her? Some cases take the view that on marriage a daughter ceases to be a member of her father's family, *Janki* v. *Nandram*[1], *Kartick Chunder Ghuttuck* v. *Saroda Sundari Debi*[2], *Bachadi* v. *Udai Singh*[3], that marriage detaches the status of the girl from the parental family and attaches it to that of her husband or his father, *Mokhada Dassee* v. *Nundo Lall Haldar*[4], that she becomes incorporated in her husband's family[5] and is born again in that family, *Janki* v. *Nandram*[1]. Applying the theory of cessation in the parental family and substitution in the husband's family it has sometimes been stated that a destitute married daughter will have only a moral and social but not a legal right to maintenance in the parental family even after the father's death leaving property—*see Janki* v. *Nandram*[1], *Bai Mangal* v. *Bai Rukmini*[6], *Shanmugha Velayudhan* v. *Koyappa*[7]. A contrary view has been taken by Miller and Sadasiva Aiyar JJ., in *Venkataraju* v. *Kotayya*[8], and in the opinion of Sadasiva Aiyar, J., such a daughter will have a legal right to maintenance even while her father was alive. The Calcutta High Court has pursued an intermediate course: According to Ameer Ali, J., if a daughter and son-in-law had been in fact maintained by the father as dependent members of his own family it will ripen into a legal obligation against the heirs inheriting her father's estate, *Mokhada Dassee* v. *Nando Lall Haldar*[4]. A Full Bench of that Court held in the same case on appeal that the real test will be to see, whether the husband's family is not in a position to maintain her[5].

To push the analogy of marriage operating as a rebirth of the girl in her husband's family to its extreme limit will be to carry legal

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1. (1888) I.L.R. 11 All. 194, 208 (F.B.).
2. (1891) I.L.R. 18 Cal. 642, 646.
3. (1933) I.L.R. 55 All. 487.
4. (1900) I.L.R. 27 Cal. 555, 562.
5. S. C. on appeal (1901) I.L.R 28 Cal. 278, 287 (F.B.).
6. (1898) I.L.R. 23 Bom. 291.
7. 1920 M.W.N. 679.
8. (1912) 23 M.L.J. 223.

fictions to absurd lengths. Marriage of a girl is not like the adoption of a boy. In adoption the boy sheds his status as a son in one family and stands invested with the same status in another. A daughter however never ceases to be a daughter though she becomes a wife and acquires membership in her husband's family. That is the reason why her rights of inheritance in the parental family remain preserved despite her marriage. Surrender by a widow though spoken of as a "figurative suicide" by her leaves her very much alive for purposes of adopting a son to her husband or claiming maintenance out of his estate, for surrender does not destroy her status as her husband's widow. In a like manner a daughter's status is not destroyed by her marriage. The obligation to maintain a daughter is the consequence of parentage, *Kusum* v. *Krishnaji*[1], and will ordinarily continue so long as that relationship subsists and the daughter is actually dependent on the father for her subsistence. Such dependence may arise either during her husband's lifetime or after his death by reason of the destitution of the husband and his family. Under such circumstances the policy of the shastras is to regard the daughter as आमाप्य पोष्या, as one who should be maintained by her parents. Manu has enjoined upon the head of a family the duty of maintaining all the poor dependents दीनाः समाश्रिताः A destitute married daughter might well fall within the ambit of that expression, but it is difficult to interpret the text as importing a legal obligation, for in the context the duty of maintaining the poor dependents is clubbed along with the duty of providing maintenance to guests and mendicants which obviously can only be a moral obligation. Shyama Charan Sarkar has stated that according to the Shastras a sonless widowed daughter would be entitled to maintenance as a dependent member of her father's family[2], and Justice Norris is reported as having said :"Even if there be a shred to hang a peg on to support this decision we will do it."[3] The view taken by the Courts that there is no legal obligation on the part of a father to provide for the marriage expenses of his daughter in the absence of ancestral property has largely reacted on the nature of the daughter's right to maintenance and though much can be said in favour of the *obiter dictum* of Sadasiva Aiyar, J., in *Venkatarazu* v. *Kotayya*[4], that a married daughter will have a legal right personally against her father for maintenance where he has means and she is destitute, no Court has so far affirmed that view directly.

1. (1938) I.L.R. 1939 Bom. 396.
2. Vyavastha Darpana, (2nd edition), p. 170.
3. Cit., in Sarkar Sastri's Hindu Law, 8th edition, p. 535.
4. (1912) 23 M.L.J. 223.

Assuming that a father is only under a moral and social but not a legal obligation to maintain his destitute daughter out of his self acquired property there seems to be very little reason for denying to her a legal right to be maintained from such property after it has devolved on his heirs. The nearness of the relationship between her and the deceased and considerations of natural love and affection can point only to that conclusion. If a daughter-in-law will have a legal claim for maintenance against her father-in-law's self acquired property in the hands of his heirs the claim of a daughter will stand almost *a fortiori*. The view of Ranade J., in *Bai Mangal* v. *Bai Rukhmini*[1], stands as an isolated instance of the negation of such right. An heir succeeding to property takes it subject to a legal obligation to maintain persons whom the late proprietor was legally or morally bound to support, and who all were so entitled to be morally supported by the deceased will no doubt depend on the relationship, the means and other circumstances of the late proprietor as well as on the principles of Hindu Law and the usages and practices of the people, *Kamini Dassee* v. *Chandra Pode Mondle*[2]; see also *Rajjmoney Dossee* v. *Shib Chunder*[3], *Khetramani Dasi* v. *Kashinath Das*[4], *Janki* v. *Nandram*[5], *Yamuna Bai* v. *Manu Bai*[6], *Mt. Bholi Bai* v. *Dwarka Das*[7] and *Rajani Kanta Pal* v. *Sajani Sundari Dassya*[8].

The case under review is noteworthy as being almost the first of its kind regarding the maintenance right of a daughter whose father had predeceased her husband against the estate of the former. If the principle be that inability of the husband and his family to maintain her would give rise to a moral obligation against the father, then it will be immaterial whether her husband had predeceased her father or died subsequently. If, on the other hand, the obligation against her father even in a moral sense can spring into existence only on the death of her husband, his family being destitute, then in the present case there would have been no such obligation against the father and as such there would be no obligation enforceable against his estate after his death. The decision under review must be taken to have affirmed the former of these two views.

DURAISWAMY IYENGAR *v.* RAGHAVACHARIAR, (1940) 2 M.L.J. 648.

This case decides an important point in the law of appropriation. It holds that an open payment by an agriculturist debtor before

1. (1898) I.L.R. 23 Bom. 291.
2. (1889) I.L.R. 17 Cal. 383.
3. 2 Hyde 103.
4. (1868) 2 Beng.L.R. A.C. 15 (F.B.).
5. (1888) I.L.R. 11 All. 194 (F.B.).
6. (1899) I.L.R. 23 Bom. 608.
7. (1924) 5 Lah. 375.
8. (1933) I.L.R. 61 Cal. 228 (P.C.).

1st October 1937 towards a promissory note cannot be theoretically appropriated towards the interest due under the note and in the absence of *actual* appropriation that way such interest will be deemed to be outstanding on 1st October, 1937 and as such wiped off under S. 8 of the Agriculturists Relief Act. In coming to that conclusion the learned Judges have argued firstly, that the rule that payments are to be applied first towards interest is more a rule for the guidance of the Court than a presumption of law regarding what has in fact been done, and secondly, that the rule that a notional appropriation cannot take the place of an actual appropriation for purposes of S. 20 of the Limitation Act will equally govern questions of appropriation as between capital and interest under Madras Act IV of 1938. It is submitted that the conclusion as well as the reasoning are weak. The general law as to appropriation is well settled. While making a payment, a debtor has the right to intimate how it is to be appropriated and the creditor must apply it accordingly, *Cory Brothers Co.*, v. *Owners of the Turkish Steamship "Mecca"*[1]. The intimation should be synchronous with the payment or made within a reasonable time thereafter, *Cory's case*[1]. If the debtor fails to so intimate his intention he loses his right in this behalf altogether, *Sreenivasachariar* v. *Krishnaiah Chetty*[2], and the right of application *devolves* on the creditor, *Cory's case*[1]; Halsbury's Laws of England (Hailsham edition) Vol. 7, p. 244, para 335. The view taken in *Chegganmull Sowcar* v. *Manicka Mudaliar*[3], that so long as neither debtor nor creditor has made an appropriation, the debtor can intimate the appropriation he wishes, has not been supported by later decisions and is also inconsistent with the theory of the right having devolved on the creditor on failure of intimation by the debtor either immediately on payment or within a reasonable time thereafter. The creditor acquires a right to have the appropriation made in the manner best advantageous to him, *Bamundoss Mookerjea* v. *Omeish Chunder Rase*[4], *Nemi Chand* v. *Radha Kishen*[5]. He has the right of election up to the "very last moment," *Cory's case*[6], even while in the witness box, *Seymour* v. *Pickett*[7], or before judgment is delivered, *Gajram Singh* v. *Kalyan Mal*[8]. What is the 'last moment' must depend upon the circumstances of each case.[9] The right may

1. (1897) A.C. 286.
2. (1940) 1 M.L.J. 860.
3. (1925) 50 M.L.J. 242.
4. (1856) 6 Moo.I.A. 289.
5. (1921) 26 C.W.N. 153.
6. (1897) A.C. 286; See also Krupasindhu Sahu *v.* Raja of Khallikota, (1915) 29 I.C. 718; Munisami Mudali *v.* Perumal Mudali, (1919) 37 M.L.J. 367; Relu Mal *v.* Ahmed (1925) I.L.R. 7 Lah. 17; Maistry *v.* Jameson, (1925) I.L.R. 5 Pat. 326; Kunjamohan Shaha Poddar *v.* Karunakanta Sen Chaudhuri, (1933) I.L.R. 60 Cal. 1265; Ram Nath *v.* Chiranji Lal, (1934) I.L.R. 57 All. 605 (F.B.).
7. (1905) 1 K.B. 715.
8. (1935) I.L.R. 57 All. 791 (F.B.).
9. Per Romer L.J., in Seymour *v.* Pickett, (1905) 1 K.B. 715, 725.

be exercised until the creditor has finally exercised the right or something has happened to render it inequitable for him to exercise it[1]. If the payment is open and there is no specific appropriation by either debtor or creditor, the creditor has a right to consider it as a payment on account of interest, *Luchmeshwar* v. *Syad Lutf Ali Khan*[2], for the rule is that the money is first applied in payment of interest and then when that is satisfied in payment of the capital, *Venkatadri Appa Rao* v. *Parthasarathy Appa Rao*[3]. This is the well settled practice of the Courts, *Maharaja of Benares* v. *Har Narayan Singh*[4]. Where the creditor receives an open payment from the debtor without any appropriation of it as between capital and interest by either debtor or creditor, and it is left to the Court to construe the effect of the payment, the *presumption* arises that the payment is *attributable* in the first instance towards outstanding interest and the presumption is operative in questions between debtor and creditor primarily, *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraja of Dharbhanga*[5]. The presumption is that what would have been done by the creditor in the ordinary course has in fact been done; in other words, the Court will do what the parties are in conscience bound to do,—see *Moonsappah* v. *Venkataraydoo*[6]. This is not a principle for the guidance of the Court merely but constitutes a presumption of what in fact has been done. The debtor has a right to express his intention, but if he failed to intimate the same he loses the right effectively and will be deemed to have agreed to the appropriation of his payment by the creditor first to the outstanding interest. The creditor may not have exercised his right either. In such a case the Court will attribute the payment to interest first and will presume that it stands constructively so appropriated even at the time the payment was made. The presumption is, however, rebuttable and could be destroyed by proof that the creditor had in fact either expressly or impliedly elected to treat the payment otherwise. Where there is no such proof, but the creditor had remained silent the Court will draw the presumption as one founded upon the debtor's intention. In so far as the decision under review treats the rule as one for the guidance of the Courts only and not having any higher force it seems to run counter to Lord Macmillan's observations in the Patna case[7].

This presumption of law stands excluded for purposes of the Limitation Act by reason of the special language contained in S. 20 which declares that payment towards interest should have been made by the debtor "as such" for purposes of saving limitation.

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1. Halsbury's Laws of England, (Hailsham edition) Vol. 7, p. 246, para 337.
2. (1871) 8 Ben.L.R. 110, 112 (P.C.).
3. (1921) I.L.R. 44 Mad. 570 (P.C.).
4. (1905) I.L.R. 28 All. 25.
5. (1933) I.L.R. 12 Pat. 318, 331.
6. (1870) 6 M.H.C.R. 32.
7. (1933) 12 Pat. 318, 331 (P.C.).

It is positive and not any constructive intent of the debtor that that section contemplates as necessary. Absence of intimation by the debtor of his intention when he makes the payment has a negative value merely and does not afford proof of any positive intent on his part. In the absence of proof of positive intent, a payment will not amount to a payment of interest as such by reason merely of what Sir George Rankin calls " the old rule," namely, that it is the right of the creditor to have payments treated in account as liquidating the interest before principal, *Ram Shah* v. *Lal Chand*[1]. The Madras Agriculturists' Relief Act does not employ any similar language. To extend therefore the exclusion of the " old rule " to questions of appropriation between principal and interest for purposes of that Act seems to be hardly justified. There seems to be nothing in that Act to suggest that appropriation to interest must be specific and actual and not constructive or notional.

According to Act IV of 1938 interest will be wiped off only if it was in fact outstanding on 1st October, 1937. The provision is penal and therefore to be strictly construed. The burden is on the debtor to show that interest was actually outstanding on that date. Where the debtor had made a payment prior to that date he may prove an intimation by him that it was to be applied to principal only or he may prove acts, declarations and conduct on the part of his creditor suggesting an intention on the part of the latter to apply the amount otherwise than to interest. In the absence of such proof the presumption of law will apply, namely, that the payment should be attributed to interest outstanding in respect of the debt in the first instance, even at the time it was made, with the result that to the extent of such payment there will be no interest remaining due on 1st October 1937, for the provisions of Act IV of 1938 to operate.

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1. (1940) 1 M.L.J. 895, 903 (P.C.).

IN THE MATTER OF AN ADVOCATE, I.L.R. 1940 All. 60 (F.B.).

This decision deals with an important point concerning the members of the legal profession, namely, within what limits an advocate can carry on money-lending transactions. In England, though there is an enumeration of offices which a practising Barrister cannot hold there is no rule in terms prohibiting a member of the Bar from entering into money lending transactions, see *Muni Reddi* v. *Venkata Rao*[1]. It is however always understood that a practising Barrister should conform to the rulings given from time to time concerning extra professional activities open to him and that if at any time he was in doubt as to the propriety or otherwise of undertaking a particular matter he should request the opinion of the profession in the absence of express rules on the point.[2] In India the rules framed under S. 15 of the Indian Bar Councils Act (XXXVIII of 1928) have prescribed that " no advocate while practising shall engage in trade or business or accept an appointment carrying a salary without previously obtaining the permission of the Bar Council and the High Court. Similar rules exist under the Legal Practitioners Act (XVIII of 1879) as well . Money-lending transactions by advocates without the prior sanction of the Bar Council will thus become reprehensible where they are carried on as a *business*. The line of demarcation between cases where the transactions afford evidence of a business pursued and cases where they don't cannot be defined with closeness or indicated by any specific formula. Each case must depend on its own facts, and it is ever a question of degree, *Edgelow* v. *MacElwee*[3]. The term business imports the notion of system, repetition and continuity[4]. It is the sum of acts repeated which constitutes the business, *Smith* v. *Anderson*[5]; *Kirkwood* v. *Gadd*[6]. There should be a series of acts done with the acquisition of gain for its object, *Smith* v. *Anderson*[5]. The nature and the number of the transactions have a material bearing, *Fagot* v. *Fine*[7]. An isolated transaction will not constitute a 'business,' *Newman* v. *Oughton*[8]. If the transactions are not habitual or systematic there is no proof of 'business,' *Halsbury's Laws of England* (*Hailsham edition*) vol. 32, p. 307, para 490; *Grainger & Son* v. *Gough*[9]. Lending at remunerative rates of interest will not *per se* be a proper test either, *Newton* v. *Pyke*[10].

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1. (1912) I.L.R. 37 Mad. 238 (F.B.).

2. Halsbury's Laws of England, (Hailsham edition), Vol. II, p. 509, para. 691.

3. (1918) 1 K.B. 205, 206.

4. *ibid.*; *Newton* v. *Pyke*, (1908) 25 T.L.R. 127; *Fagot* v. *Fine*, (1911) 105 L.T. 583.

5. (1879) 15 Ch. D. 247, 277.

6. (1910) A.C. 422, 431.

7. (1911) 105 L.T. 583.

8. (1911) 1 K.B. 792.

9. (1896) A.C. 325, 443.

10. (1908) 25 T.L.R. 127.

A person can be said to carry on a money-lending business only if he is ready and willing to lend to all and sundry provided that they are from his point of view eligible, *Litchfield* v. *Dreyfus*[1]. System, continuity, object, class of persons to whom money is lent, nature of the transactions and their number are the relevant criteria in judging whether the transactions are tantamount to the carrying on of a business. Eight instances spread over a period of three years, though speculative in character were held insufficient to make out a business, In re *Tika Ram, Vakil*[2]; a hundred transactions within the same period, some in his own name and others in the name of his son, were, however, held to be ample proof of money-lending being pursued as a business, *see Chinnarappa* v. *Thimma Reddi*[3]. In the decision under review an advocate had within the space of ten years advanced loans on twelve occasions, three on mortgages and nine on pro-notes, the former in the name of his son and the latter in his own name, and all of them were to friends and relatives. The Full Bench held that the case was one on the " border line " and that the advocate had " dangerously sailed near the wind."

Where an advocate happens to be a member of a joint and undivided Hindu family carrying on an ancestral money lending business, so long as he is not in charge of the business, his conduct will not be culpable, though he draws regularly a share of the profits of the business. If, however he enters into a partnership with the other members of the family in the starting of a new business there will be no protection afforded to him, where he has not obtained the previous sanction of the Court to his participating in the venture. Likewise where being the manager of the joint family, a practising advocate is looking after a family business as well without the Court's permission, his conduct will become reprehensible, *see Muni Reddi* v. *Venkata Rao*[4]. The Allahabad High Court has taken a slightly different view in one case, namely, that the running of an ancestral business may not amount to entering into a business but still it was proper that the advocate should give notice to the Court and obtain its permission, *see* In re *Tika Ram, Vakil*[2]. Likewise it will be unavailing for an advocate to plead that he is running the money-lending business not for his own gain nor with his own money but as the guardian of a minor, with the minor's funds and for the minor's benefit, *Chinnarappa* v. *Thimma Reddi*[3].

The Allahabad High Court has suggested in the instant decision that " it is in the interest of the advocates themselves that before they make advances by way of loans they should obtain the previous

1. (1906) 1 K.B. 584, 589.
2. (1919) I.L.R. 42 All. 125 (F.B.).
3. (1910) 8 I.C. 677.
4. (1912) I.L.R. 37 Mad. 238 (F.B.).

sanction of the Bar Council and of the Court." Couched in such terms the direction seems to be too wide and rather startling. Surely it cannot be intended that even where a legal practitioner gives loans to friends or relatives, on ordinary terms by way of assistance or accommodation such permission should be obtained. If in the case of even isolated transactions, the permission of the Bar Council and the Court is to be sought for the projected loan, the injunction will easily tend to become oppressive and unworkable in practice. If there is no question of a practising lawyer carrying on money-lending transactions as a business where is the need for any sanction of Court or of any other authority, except possibly where the advocate occupies a fiduciary or quasi-fiduciary character towards the borrower, or is lending on usurious terms or by way of speculation, or the borrower stands shut off from independent advice? If there is nothing objectionable in an advocate buying land, erecting buildings and letting them out to tenants thereby securing to himself a regular supplementary income, equally there cannot be any objection to an advocate giving loans and deriving an income thereby. To call the former alone an investment and therefore unobjectionable, but not the latter is not warranted by any intelligible consideration. In every case the proper test will be to see whether the transactions serving as a source of supplementary income, whether by way of money-lending or otherwise, amount in fact to the carrying on of a '*business*', in the sense explained *supra*.

RANDIR KARAM SINGH *v.* BHATTACHARJI, I.L.R. 1940 All. 100.

The construction of the term "rights" in S. 1 of the Caste Disabilities Removal Act (XXI of 1850), which declares *inter alia* that so much of any law or usage now in force as inflicts on any person forfeiture of rights or property on change of religion shall cease to be enforced as law, was one of the points dealt with in this case. The question was whether it would be competent to an Indian Christian who prior to conversion had been a Sikh governed by the principles of Hindu law and custom to adopt a son. Answering the question in the negative, the Allahabad High Court has held that the Act preserves only rights to property and not any other class of rights. It is but reasonable that such rights of the apostate as were attributable to and flowed from his adherence to Hinduism should on apostasy be deemed to have been deliberately abandoned by him. Intention to change one's faith must necessarily import with it an intention to forego the rights founded on the doctrines of the original faith and compatible with them only. Acceptance of a new faith involves the acceptance of a system of law consistent with the tenets of the new faith. The rights and obligations incident to the original

status will cease and the Act XXI of 1850 only preserves his rights to property but not his original status, *Adam Haji Peer Muhammad Issac Sait* v. *Kunkam*[1]. Monogamy is an essential part of Christianity and a Hindu convert to that religion cannot possibly take a second wife, while his first wife is alive and the marriage with her remains undissolved. Likewise Christianity does not recognise the right to adopt a son in the sense in which the Hindu law allows it. Hence it will be unavailing to rely on Act XXI of 1850 as preserving to a person the right of adoption which he had as a Hindu, even as it would be unavailing for him to rely on the Act as enabling him to have a plurality of wives. The object of Act XXI of 1850 was really to relieve a person of forfeiture of property rights imposed by the systems of personal laws in this country, on apostasy, so that evangelical enterprise may not labour under any handicap. Thus neither the policy of the Act nor the implications of a change of faith would warrant a larger construction of the term " rights " in S. 1. On apostasy the law of adoption recognised by Hindu law should be taken to have been given up by the convert, *Bai Machhbai* v. *Bai Hirbai*[2]. The Bombay High Court however recognises the possibility of the convert retaining the usage and law in question even in his new status by way of custom[2]. It is questionable how far such a custom can be recognised where its effect will be to enable the apostate to do something which is repugnant to the tenets of his new faith. It is true that conversion will not deprive a convert of his right to give his Hindu son in adoption, *Shamsingh* v. *Shantabai*[3], or of his rights of guardianship over his Hindu children, *see Mahomed* v. *Radhibai*[4], *Dwijapad* v. *Baileau*[5], unless the interests and welfare of the minors would dictate a contrary course, *Skinner* v. *Ords*[6]. The true explanation for the preservation of these rights despite apostasy is that they are not in any wise repugnant to the articles of his new faith and they also sound in property. The protection afforded to the convert by S. 1 of the Act XXI of 1850 is thus available in such cases. The right to adopt a son or to have a plurality of wives stands on an altogether different footing and is therefore outside the scope of such protection.

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1. (1937) 46 L.W. 772.
2. (1911) I.L.R. 35 Bom. 264.
3. (1901) I.L.R. 25 Bom. 551.
4. (1919) 47 I.C. 817.
5. (1916) 20 C.W.N. 608.
6. 14 Moo. I.A. 309.

PANNA LAL *v.* COLLECTOR OF MEERUT, I. L. R. 1940 ALL. 181.

What precisely is the meaning of the expression "as if it were an arrear of land revenue" used in connection with the recovery of dues payable to a Co-operative Society by R. 137 (1) (U.P.) framed under S. 43 of the Co-operative Societies Act, 1912 was one of the points decided in this case. This expression in the same or cognate forms occurs in a number of statutory enactments containing prescriptions for recovery of sums payable to Government or other public bodies. In Madras, some enactments provide that such sums may be recovered "by the *same means* by which arrears of land revenue are recoverable", *see* S. 5 of the Compulsory Labour Act (Madras Act I of 1858). Some other enactments direct their recovery "in the *same manner* as arrears of land revenue", *see* S. 52 of the Revenue Recovery Act (Madras Act II of 1864); S. 2 of the Irrigation Cess Act (Madras Act VIII of 1865); and S. 58 (1) of the Co-operative Societies Act (Madras Act VI of 1932). A number of other statutes prescribe the realisation of any such sum "*as if it were* arrears of land revenue", *see* S. 66 of the Forest Act (Madras Act V of 1882); S. 28 of the Abkari Act (Madras Act I of 1886); S. 89 of the Salt Act (Madras Act IV of 1889); S. 60 of the Court of Wards Act (Madras Act I of 1902); S. 91 of the Local Boards Act (Madras Act XIV of 1920); and S. 70 (2) (ii) (*c*) of the Hindu Religious Endowments Act (Madras Act II of 1927); *Cf.*, also S. 30 of the Indian Income-tax Act (Act II of 1886); S. 7 of the Land Improvement Loans Act (Act XIX of 1883); S. 5 of the Agriculturists Loans Act (Act XII of 1884); S. 194 of the City of Rangoon Municipal Act (Burma Act VI of 1922) etc. A few statutes have directed recovery of the demand "*as an* arrear of land revenue", *see* S. 9 of the Land Encroachment Act (Madras Act III of 1905); S. 6 of the Electricity Duty Act (Madras Act V of 1939); *Cf.*, also S. 44 of the Co-operative Societies Act (Act VI of 1912).

In Madras, the procedure regarding recovery of arrears of public revenue is set out in the Revenue Recovery Act, 1864. S. 42 postulates the effect of a sale of land on account of arrears of revenue under the Act as passing the property free of all antecedent encumbrances thereon to the purchaser. S. 52 prescribes that arrears of revenue other than land revenue, as well as cesses lawfully imposed upon land *etc.*, may be recovered in the same manner as arrears of land revenue under the Act. The question whether S. 42 would stand extended by S. 52 to a sale on account of arrears of abkari revenue, which according to S. 10 of the Madras Abkari Act, 1864 were to be recovered in *like manner* as arrears of land revenue, so as to pass the property free of encumbrances to the purchaser at the revenue sale,

has been answered in the negative, *Ramachandra* v. *Pitchaikanni*[1]. The reason is that land remains security only for public revenue (S. 2), that abkari dues are not included in the definition of public revenue in S. 1 and that a reading of Ss. 3 and 4 suggests that an arrear of revenue under the Act means only an arrear of public revenue. Consequently though recovery of arrears of abkari revenue may be effected in like manner as recovery of arrears of land revenue, still a sale of land on account of the former will not give a preferential title to the purchaser free of encumbrances. In the case, however, of a sale on account of water cess, it has been held that the purchaser would get a free title despite the fact that S. 2 of the Irrigation Cess Act has used language similar to that found in S. 10 of the Abkari Act of 1864, namely, that the cess shall be realised in the same manner as arrears of land revenue, *see Vellapayal Ambalam* v. *Karuppiah Pillai*[2], *Dorayya* v. *Ayyanna Charyulu*[3]. This difference in the legal result is based upon the inclusion of water cess within the meaning of the term "public revenue" in S. 1 of the Revenue Recovery Act, which would *proprio vigore* attract S. 42 of that Act to sales held on account of public revenue. It was held that S. 2 of the Irrigation Cess Act regarding recovery of water cess should be deemed to be a superfluity which cannot detract from the legal effect of the sale as set out in the Revenue Recovery Act, *ibid.*

Whether the expression "as if it were an arrear of land revenue" connotes something different from the expression "in like manner as arrears of land revenue", as regards the legal effect of a sale held on account of arrears of particular dues so made recoverable has also been answered in the negative, *Chinnaswami Mudali* v. *Thirumalai Pillai*[4], *Ibrahim Khan Sahib* v. *Rangaswami Naicken*[5]. So wherever a statute directs the recovery of any sum "as if it were an arrear of land revenue," *prima facie* it is only the procedure prescribed by the Revenue Recovery Act that will stand incorporated by reference and a sale held in pursuance of such procedure will not yield to the purchaser a preferential title free of encumbrances, *Chinnaswami Mudali* v. *Thirumalai Pillai*[6], *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*[7], *Lachmi Narain Singh* v. *Nand Kishore Lal Das*[8], *Ibrahim Khan Sahib* v. *Rangaswami Naicken*[9], *Muthusamier* v. *Sree Sreemethanithi Swamiyar*,[10]

1. (1883) I.L.R. 7 Mad. 434.
2. (1911) I.L.R. 37 Mad. 49.
3. (1914) 27 M.L.J. 295.
4. (1901) I.L.R. 25 Mad. 572.
5. (1905) I.L.R. 28 Mad. 420.
6. (1901) I.L.R. 25 Mad. 572 (Land Improvement Loans Act, 1883, S. 7).
7. (1902) I.L.R. 26 Mad. 420 (Income-tax Act, 1886, S. 30).
8. (1902) I.L.R. 29 Cal. 537 (Agriculturists Loans Act, 1884).
9. (1905) I.L.R. 28 Mad. 420 (Abkari Act, 1886, S. 28).
10. (1913) I.L.R. 38 Mad. 356 (Local Boards Act, 1884).

Thammayya v. *Ramanna*[1], *R. M. V. V. M. Chettyar Firm* v. *Subramaniam*[2], *Nagabushanam* v. *Venkanna*[3], *Chinnammal* v. *Saithakkathi*[4]. No doubt it has been sometimes suggested that the phrase "as if it were an arrear of land revenue" if strictly construed, would import that the property is sold free of encumbrances, *see Govindarajulu Naidu* v. *The Secretary of State for India*,[5] and that the term "as if" cannot be said to have reference solely to procedure or to have been intended by the Legislature not to import the operation of S. 42 of the Revenue Recovery Act, *Sankaran Nambudripad* v. *Ramaswami Ayyar*[6]. The weight of authorities indicating a contrary conclusion has however been recognised and followed in these very cases. The decision under review also holds that recovery of any sum in the same manner as an arrear of revenue has reference only to the procedure to be adopted and does not import the substantive right of a purchaser at a sale held on account of arrears of land revenue.

Even the use of the phrase "*as* an arrear of revenue" instead of "*as if it were* an arrear of revenue" in some of the statutory provisions for realisation of sums due either to Government or to a public body may not *per se* point to a different result, inasmuch as the right of the purchaser to get a preferential title free of encumbrances would always depend upon the character of the dues, whether they are such that in law the property sold could have been regarded as a security therefor.

VENKAYYA PANTULU *v.* SURYA PRAKASAMMA, (1940) 2 M.L.J. 328.

One of the points decided in this case was that a successful prosecution for defamation resulting in conviction will be no reason to reduce the amount of damages awardable to the defamed party in a subsequent civil action. It has always been considered that in such cases the pursuit of the civil remedy in addition to the criminal is not incompetent, *Misr Ramji* v. *Jiwan Ram*[7] : *Jodhi Ram* v. *Abdul Mian*[8] ; *Akhil Chandra Biswas* v. *Akhil Chandra Dey*[9] ; *Md. Samiullah Khan* v. *Bishu Nath*[10]. A Bench of the Calcutta High Court has, however, taken the extreme view that where after securing a conviction, a civil suit is subsequently brought for damages in respect of the same injury, the civil Court is not bound as a matter of law to

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1. (1926) 51 M.L.J. 475.
2. (1927) I.L.R. 5 Rang. 458 (City of Rangoon Municipal Act, 1922).
3. (1929) I.L.R. 53 Mad. 151 (Elementary Education Act, 1920).
4. A.I.R. 1935 Mad. 882 (Income-tax Act, 1922, S. 46).
5. (1933) 65 M.L.J. 317.
6. (1918) I.L.R. 41 Mad. 691.
7. (1881) A.W.N. 131.
8. (1893) A.W.N. 63.
9. (1902) 6 C.W.N. 915.
10. A.I.R. 1928 All. 316.

award any damages at all, *see Ooma Churn* v. *Girish Chunder*[1]. Another view is to be gathered from some cases, namely, that if punishment in person, was resorted to, that must always be an important element in mitigation in subsequently estimating the amount of penalty to be inflicted in pocket, *Misr Ramji* v. *Jiwan Ram*[2]; *Ma Sein Tin* v. *U Kyaw Maung*[3]. The decision under review has marked its dissent from these views and it is submitted that there is ample justification for the same. The recognition of criminal and civil responsibility as distinct in character, though one and the same act may be both a wrong and an offence is noticeable from mediaeval times. The civil responsibility is directed towards compensating the injured individual: the criminal liability on the other hand arises because of the disturbance to the peace of the society or the State. The liabilities being distinct, there is no reason why the right of the injured party to damages should be affected by the conviction suffered by the wrong-doer.

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1. (1876) 25 W.R. 22.
2. (1881) A.W.N. 131.
3. A.I.R. 1936 Rang. 332.

MADAN LAL *v.* NAWAB SAYED REZA ALI KHAN (RULER OF RAMPUR STATE), I.L.R. (1940) 1 Cal. 344.

An interesting point and one more or less of first impression relating to the immunity of the Rulers of Indian States from the jurisdiction of British Indian Courts arose for decision in the above case. The question was whether an insolvency petition was maintainable without the previous consent of the Crown Representative under S. 86, Civil Procedure Code, where an applicant's only creditor was a Ruling Chief. In answering the question in the affirmative the learned Judges of the Calcutta High Court have suggested: (1) the immunity of a foreign prince from the jurisdiction of British Courts extends only to his person and *public* property; (2) in India such immunity must be sought within the language of S. 86, Civil Procedure Code, which will not cover cases like the present; (3) in view of the provisions contained in the Provincial Insolvency Act making specific provisions of the Civil Procedure Code applicable to insolvency proceedings it will be doubtful if the rule contained in S. 86 could be extended to such proceedings; and (4) the mere issue of a notice to a creditor under S. 19 (2) of the Provincial Insolvency Act can hardly be described as a legal process. It is submitted that these reasons are not quite valid.

Founded essentially on the principle *par in parem non habet imperium* and partly on the difficulties attendant upon enforcing the judgment of the Courts of one State against a foreign State as well as on considerations of reciprocity the rule has been recognised that a foreign sovereign is immune from the jurisdiction of the municipal courts of a country. According to Dicey the rule is that "no *action* or *other proceeding* can be taken in the courts of this country against a foreign sovereign, nor can the property of a foreign sovereign be seized or arrested."[1] Two propositions of international law seem to be well established and beyond doubt, namely, (1) the courts will not implead either *directly* or *otherwise* a foreign sovereign, *i.e.*, will not by their process make him against his will a party to legal proceedings whether they involve process against his person or seek recovery of specific property or damages, and (2) courts will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.[2] The term 'property' in the context is not limited to ownership but covers also lesser interests, which may not merely be not proprietary

1. Conflict of Laws, 5th edition, p. 194; *see also* Lawrence, Principles of International Law, 7th edition, p. 223 and Chung Chi Cheung *v.* The King, (1939) A.C. 160, 175.

2. Per Lord Atkin in Compania Naviera Vascongado *v.* S. S. Cristina, (1938) A.C. 485, 490.

but not even possessory.[1] Nor is the immunity confined only to property used for the commercial or military purposes of the sovereign. At the present time it seems to extend also to his personal private property.[2] That no distinction can be allowed between the public and private property of a sovereign has been recognised in India also.[3] The rule that a foreign sovereign cannot be impleaded is by no means absolute and possible exceptions are cases of suits to administer a trust fund in Court in which a foreign sovereign is interested,[4] or cases of winding up of banks and companies in the assets of which a foreign sovereign may have an interest.[5] The reason for recognising such exceptions is that otherwise the administering of justice to the other *castuis que trustent* will be frustrated and there is no comity of nations either allowing immunity to foreign sovereigns in such circumstances. Subject therefore to these limitations founded on considerations of expediency, a foreign sovereign is held otherwise immune from the jurisdiction of British courts even in regard to his private property. Save in the case of a cross bill or bill of discovery in aid of a defence and in the case of a sovereign voluntarily coming in to make or resist a claim he cannot be effectually cited. In the words of Lord Langdale, M.R., " even the failure of justice in some particular cases would be less prejudicial than attempts to obtain it by violating immunities thought necessary to the independence of princes and nations."[6]

It is true that in India the immunity of the Ruling Chiefs is defined by S. 86, Civil Procedure Code. The rule being statutory the express provisions thereof are imperative and must be observed and cannot be waived.[7] S. 86 provides that a Ruling Chief may be sued in any competent court with the consent of the Crown Representative but not without such consent. S. 141 of the Code prescribes that the procedure provided in the Code in regard to suits shall be followed as far as it can be made applicable in *all proceedings* in any court of civil jurisdiction. It has been pointed out by the Privy Council that " the proceedings spoken of in S. 647 (S. 141 of Act V of 1908) *include* original matters in the nature of suits such as proceedings

1. Per Lord Wright, in Compania Naviera Vascongado *v.* S. S. Cristina (1938) A.C. 485, 507.

2. Per Lord Atkin in *ibid.*, p. 490 ; *see also* The Lord Advocate *v.* Lord Dunglas, 9 Cl. and Fin. 211.

3. Elphinstone *v.* Bedreechund, (1830) 1 Knapp. P.C. 316; The Advocate-General of Bombay *v.* Amerchund, 1 Knapp. P.C. 329 f n.

4. Duke of Brunswick *v.* The King of Hanover, (1843) 6 Beav. 1, 39 ; Lariviere *v.* Morgan, (1872) L.R. 7 Ch.App. 550 ; Morgan *v.* Lariviere, (1875) 7 H.L. 423.

5. Russian Bank for Foreign Trade, *In re.*, (1933) 1 Ch. 745.

6. Duke of Brunswick *v.* The King of Hanover, (1843) 6 Beav. 1.

7. Gaekwar Baroda State Railway *v.* Hafiz Habib-Ul-Haq, I.L.R. 1938 All. 601 (P.C.).

in probates, guardianships and so forth and do not include executions."[1] The antithesis seems to be between non-execution proceedings and other proceedings. The Calcutta High Court has however added to this dictum the word "only" and laid down that S. 141 extends the procedure of the Code *only* to original proceedings in the nature of suits.[2] A larger view of the scope of S. 141 has been taken in other High Courts.[3] S. 86, Civil Procedure Code, is really a statutory adaptation of the English rule under which no action or *other proceeding* can be brought in a British Court against a foreign sovereign and in *Statham* v. *Statham*,[4] it was held that the principle of S. 86 will apply to proceedings in divorce in which a Ruling Chief is sought to be made co-respondent, though such proceedings are commenced only by a petition and not by a plaint. The expression 'action or other proceeding' though not a term of art is yet familiar as regards its sense. Where a person cannot be heard to protect his interest unless he appears as a party he will be deemed to be a person claiming an interest and as such by the very terms of any notice issuing to him impleaded.[5] A proceeding in insolvency is no doubt initiated by a petition,[6] yet, the latter has to be signed and verified in the manner prescribed in the Civil Procedure Code for signing and verifying plaints[7] and the procedure contained in the Civil Procedure Code with respect to the admission of plaints is to be followed in the case of insolvency petitions.[8] It is thus a proceeding in the nature of a suit and in any event the person affected by the petition being unable to be heard in protection of his rights unless he appears before the Insolvency Court he should be deemed *impleaded* by the notice issuing to him under S. 19 (2) of the Provincial Insolvency Act and thereby brought within the ambit of S. 86, Civil Procedure Code, read with S. 141. The decision in *Official Liquidators, Dehra Dun Mussoorie Electric Tramway Co.* v. *Nabha State*[9] supports this conclusion. It was there held that a proceeding under S. 184 of the Indian Companies Act, 1913, which directs the Court to settle a list of contributories after an order for winding up is not one to which S. 86, Civil Procedure Code, will be attracted, for, by merely settling a list no interest in property of the Ruler is actually affected, whereas where there was any case of an order to be made under S. 186 of the Companies Act for payment of

1. Thakur Parshad *v.* Fakir-ul-lah, (1894) I.L.R. 17 All. 106 (P.C.).
2. Sarat Chandra Bose *v.* Bisweswar Mitra, (1926) I.L.R. 54 Cal. 405.
3. Venkatanarasimha Rao *v.* Suryanarayana, (1925) 50 M.L.J. 75; Venkatarama *v.* Marudachala, A.I.R. 1931 Mad. 798.
4. L.R. 1912 P. 92.
5. Per Lord Atkin in Compania Naviera Vascongado *v.* S. S. Cristina, (1938) A.C. 485, 492.
6. S. 7 of the Provincial Insolvency Act, 1920.
7. S. 12, *ibid.*
8. S. 18, *ibid.*
9. I.L.R. 1938 All. 742.

money due from a person the order can be made by the Court only in cases where a suit to recover the amount would be maintainable, which in the case of a Ruling Chief would automatically bring in the provisions of S. 86, Civil Procedure Code.

The reasoning founded on specific provisions of the Civil Procedure Code being made applicable to proceedings in insolvency by express provisions of the Provincial Insolvency Act[1] as a pointer to the non-applicability by implication of other parts of the Civil Procedure Code is unacceptable. S. 5 of the Provincial Insolvency Act lays down that subject to the provisions of that Act, the Court in regard to proceedings under that Act *shall* follow the same procedure as it follows in the exercise of original civil jurisdiction. The section can only mean that the provisions of the Civil Procedure Code shall govern proceedings in insolvency except where different provisions are to be found in the Insolvency Act itself. There is no warrant for circumscribing the scope of that section by arguing that if by the combined operation of S. 5 of the Insolvency Act and S. 141 of the Civil Procedure Code all the provisions of the Code relating to suits are to be attracted then the provisions of the Insolvency Act making certain specific provisions of the Code applicable to insolvency proceedings would be wholly redundant. Surely the more correct mode of appreciation will be to construe that except as otherwise provided in the Insolvency Act ordinarily all the provisions of the Civil Procedure Code relating to suits will apply to insolvency proceedings and more particularly those provisions of the Code which are in terms made applicable to specific matters by specific sections of the Insolvency Act.

The last of the reasons mentioned in the instant decision, namely, that the issue of a notice to a Ruling Chief under S. 19 (2) of the Insolvency Act can hardly be described as a legal process stands contradicted by the recognition in another part of the judgment that it could be argued that by the issue of such notice " there is an indirect attack upon his personal immunity " and that the necessary result of it where the Ruling Chief is amongst the creditors is " indirectly to subject him to legal process on pain of the debt being extinguished." This will be *a fortiori* where the only creditor is a Ruling Prince. It is submitted that the correct view would be to hold that in such a case the previous consent of the Crown Representative will be necessary to the maintainability of the debtor's petition for adjudication.

[End of Volume 1940—II.]

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1. *See* Ss. 2 (2), 12, 13, 18, 20, 21, 28, 60, 75 etc. of the Provincial Insolvency Act, 1920.